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CONCERNING

TREASONS,

AND

BILLS of Attainder.

*Majestas Reipublicæ, est in quâ continetur
Dignitas & Amplitudo Civitatis.— Et
læsæ Majestatis Crimen est, Quum Maje-
stas Minuatur. Tull. ad Heren. I. & 4.*

*Licet etiam apud Concilium, accusare quo-
que, & discrimen Capitis intendere.*

Tac. de Mor. Ger.

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A D I S



A

DISCOURSE

Concerning

Treasons, &c.



THE regular and impartial Administration of Justice, as it is the *chief End* for which Government was at first instituted ; so it is the only Means by which it can be long preserved. For whenever a Failure of it happens, either by the Weakness or Corruption of its Ministers ; it throws a State into such Convulsions, as generally end in Ruin. The most considerable

B

Branch

Branch of publick Justice, is that which relates to the *Punishment of Offenders* ; since it is that which gives an additional Weight and Sanction, even to its Decisions of another nature ; and it is the *Fear of that only*, which retains the greatest Part of Mankind from committing those Disorders, which would render all Society intolerable.

Before the *Report from the Secret Committee* was printed, the Friends of the late Ministry contented themselves with denying that they were guilty of any Crime ; and so long as there was not any demonstrative Evidence of their Guilt, they had Credit enough, even upon that foot, to maintain the Spirit of their Party : But since that *Report* is published, they have been forced to give the Dispute a new Turn, of a much more *dangerous nature*. They do not now pretend to affirm their Actions justifiable ; they, to a Man, all condemn their Procedure in every particular ; yet, from I know not what kind of Principle, they are wonderfully industrious and zealous, to argue the World into a Belief, that by reason of some Defects in the Forms of Law, some *imaginary Flaws* in our Constitution, the People of *Great Britain* have not a Right, by their Representatives in Parliament, of demanding any Capital Punishment to be inflicted upon them.

That

That some particular Persons related to the Criminals, or Partakers with them in their Crimes, should lay down Propositions of this nature, is not surprizing: But that a numerous Body of Men, professing a Zeal for their Country, and a steddy Loyalty to the *present King*, should be capable of reasoning themselves into it, is amazing. For is it possible, that a Society of many Millions should not have that Right, which no single private Man can ever be supposed to be without? Can a Nation be ever reduced to such Circumstances, as to be deprived of the Use of such Means, as are absolutely necessary to its Preservation? It is a most infallible Maxim, that in a Country *where nothing is punished, every thing will be attempted.* And yet this is the Case to which these People would bring the Government: So strongly are they attach'd to the Interests of a Party, that they choose rather to sacrifice the Law, than surrender up their Leaders to Justice. For it is Nonsense to talk of Laws and Constitution, if any Man may commit what is notoriously most prejudicial to his Country, and yet escape with Impunity by screening himself behind Formalities. Such an evasive Transgression of the Law, instead of justifying the Criminal, should, by all the Rules of common Sense, enhance his Guilt; since it necessarily implies him to be conscious, that

what he did was illegal and unwarrantable. In short, all Forms of Law, and I may add *Statutes*, relating to the Adjudication or Trial of *Treasons*, were intended as *Barriers to the Liberties of the People* against the Incroachments of the Crown, and not to protect corrupt Ministers from the Prosecutions of Parliament.

As the Design of this Paper is not particularly to examine the Conduct of the late Ministry, I shall not say much concerning them, but refer the Reader to the *Report* from the *Committee of Secrecy*, in which all their Actions seem to be represented in their proper Light. What I propose, is, to consider the Arguments which are made use of to prevent their Punishment. I do not mean those, which are urg'd by Persons who can still say, they think their Actions entirely justifiable; but such as, allowing their Actions to be highly criminal, and prejudicial to their Country in general, yet warmly oppose their being punished capitally; by reason, say they, that what they did is not within the express Letter of any Law, &c.

The Substance of what they alledge amounts to this; That the Uncertainty of *Treason* at the Common Law being by Experience found to be a great Grievance, an *Act of Parliament* was made *Anno 25^o E. 3.* to remedy it; by which all *Treasons* are

are reduc'd and limited to the particular Cases mentioned in that *Statute*. That this *Statute* ought to be observ'd and kept sacred, it having met with the constant Approbation of every Age since it has been made, and having been confirm'd by several subsequent *Acts of Parliament*.

They own indeed, that there is a Clause in the *Act*, by which the Parliament did reserve to themselves and Successors, the Power of declaring any other Case to be *Treason*, which might happen in Time to come. But then they positively affirm, that Clause of Reservation to be repeal'd by the 1^o H. 4. Cap. 14. and 1^o Mar. Reg. Cap. 1, &c. And that therefore nothing can now be said or declared to be *Treason*, but what is plainly express'd to be such in the 25^o E. 3. or some other subsequent *Statute*.

It is not, say they, the Case of these particular Persons, which is to be so much considered: The Law ought to be sacredly observed; and People ought not, in order to punish a few Criminals, tho' of the deepest Guilt, make such Precedents, as may be of perpetual Prejudice to the Liberties of *Britain*. They will readily agree, that the Actions of the late Ministry were as contrary to the true Interest of their Country, as possible; but it not appearing by the *Report*, that what they did is *Treason*,

within the exprefs Words of that *Statute*, or of any other, they cannot agree to their being punish'd as Traytors: *Not because they do not think them criminal, but because the Law is defective.*

And farther, as to any Proceedings against them by way of *Bill of Attainder*, as it is what they are most apprehensive of, so is it what they clamour the most against; asserting all such *Bills* to be in their own Nature unjust: For, say they, the Law of *England* is every Man's Inheritance, and let him be never so criminal, it is always unjust to deprive him of the Privilege and Protection of it. It is the Law that is the Rule of every Man's Actions, and that determines them to be either just or unjust: Every Man therefore has reason to conclude all his Actions to be (if not justifiable) at least unpunishable, so long as the Law does not take hold of them. So that, say they, all Acts of Attainder must necessarily be either useless and impertinent, or highly wicked and unjust: For every Man's Actions, if they are within the Extent of the Law, are punishable in the ordinary Course of it; and if they are not, a *Bill of Attainder* is a *Judgment ex post facto*, punishing the Person for Actions, which he had all the Reason in the World, to think himself safe in doing.

This Language and Way of Reasoning is certainly very proper for such Persons, who openly profess themselves to be against the Prosecution of the late Ministry in any manner whatsoever, and who perhaps at the bottom are so thoroughly their Friends, that they think the *only Fault* in their Schemes and Designs to be *their want of Success*. And without doubt, the great Heat they shew in their Defence, is much more justifiable under this plausible Pretence of a Veneration for the Laws and Constitution, than it would be, did they openly avow an Approbation of all the late Transactions. And I am apt enough to believe, that if we were able to discern Persons and Things in their proper Light, we should find this alone to be the true Spring and Cause of all this strange *extempore Zeal* in several of those very Persons, who upon other Occasions have been the foremost to trample upon that very Constitution they would now seem to defend.

But however weak and fallacious these Arguments are, and how visible soever it is, that they are only made use of to serve their Cause in this critical Juncture of Affairs; yet have they deceived many well-meaning Persons, who being always in earnest themselves, when they talk of the Law and Constitution, think that all others are so too; and by that means they are

frequently drawn in to be subservient and assistant to such Designs, and to protect such Persons, as they most abhor. So long as the Dispute was wholly political, as whether this or that Scheme was the more eligible, &c. I own I did not think my self, or any other private Person, to be much concern'd: But when they carried Matters so far, as to argue, that notwithstanding they shou'd be criminal, yet they *were so dextrously criminal*, the Law had not Force sufficient to punish them: The first time I heard this Notion, it shock'd my Reason. It introduces such an unaccountable Weakness and Incapacity into the very original Frame of our Constitution, that the Government (if this Doctrine be true) is not able to support it self any longer than the *very worst Man, subject to it, will vouchsafe to permit.*

I immediately endeavour'd to examine, as far as I was able, the Laws concerning Treason, to see whether our Constitution labours under those Flaws and Defects, which they assert it does. And if the uninterrupted Practice of Parliaments is a sufficient Evidence of what our Ancestors esteem'd as Law in Parliament; then, till better informed, must I think, that such Persons as are guilty of the Crimes charged from the Report of the Secret Committee, *are by the Law of England punishable as Traytors:*

And

And that the proceeding against any Person by way of *Bill of Attainder*, for Actions, which are Treasons by the Common Law, and which are not specified to be such in any Statute, is not only just, but legal, and even in some Cases absolutely necessary to preserve our Constitution : and that it has been the constant Practice of Parliaments. In order therefore to make this clear and evident, I shall,

I. Examine what was the true and antient Notion of Treason at the Common-Law, and what was the Practice of our Ancestors in Parliament until the Statute of 25 E. 3. was made.

II. I shall then consider what Alteration that or any other Statute has made upon the Common Law, and what has been the Practice of our Ancestors subsequent to it.

I. The Word *Treason* properly signifies a betraying, and therefore cannot be committed, but where some Trust is reposed. *Britton*, p. 16. says that it is “ *Chescun damage que lon fait a scient, ou procure de faire,* “ *a que lon fait amy.* It is every Damage, “ which any Man knowingly does or procures to be done to another, to whom he “ pretends to be a Friend. So that in this Sense every Man who acts contrary to any
Obli-

Obligation he is under, may be said to commit a Treason, (*i. e.*) to betray or deceive the Person who is the Object of it, who must necessarily be supposed to have plac'd a Confidence in his Performance, since he had a Right to exact it. And therefore it is essential to the Notion of Treason, that there should be some moral Relation between the Parties; Which is either natural, as between *Father and Son*, &c. or contracted, as between *Lord and Tenant*, &c.

This was the old and original Sense of the Word; and it was a considerable Time before it came to be appropriated to the Sense we now use it in. At first, almost every Breach of Trust was comprehended under it; but now Custom has entirely altered and changed it, so as to make it signify only some certain Species of *Breaches of Trust of the highest Nature*.

Andrew Horn, an Author who lived either in the Reign of *Ed. 1* or *2*. never makes use of the Word Treason, to express any Crime committed against either King or Kingdom. Tho' it is manifest that the acting contrary to those Obligations which every Man is under to the Publick, is within the general Definition of the Word. But in his Division of Crimes he makes two distinct Chapters of *Crimes of Majesty*, and *Crimes of Treason*.

He distinguishes his Crimes altogether by the Object or the Person against whom they are committed, and defines the Crime of Majesty to be an Offence done against the King. And in treating of it, he does not regard the different Heinousness of Facts, but makes the Term so general as to include all Offences (almost) whatsoever, which are done against the King. For, says he, *e. g.* all those who commit Perjury against the King fall into this Offence; as, *e. g.* the King's Ministers, who are sworn to do Justice, and forswear themselves in any particular. He enumerates a great number of Crimes of this and inferior Natures, all under the Denomination of *Majesty*, some of which were stiled mortal Offences, and others not so. So that it seems (according to this Author) every Crime committed against the King or Publick, by reason of their Community of Object, was equally a Crime of Majesty. But as all Crimes are not equal as to the Heinousness of their Guilt, so the Punishment of these Crimes was to be inflicted *pro modo & ratione delicti*; the Adjudication of which was absolutely in the Breast of the Judges, who were entirely at the Disposition of the Crown.

The Term *Treason* he makes to be almost as general as that of *Majesty*. Since he makes it include every other Crime, which

which implies the Breach of an Obligation, which may be contracted by *Blood, Affinity, Homage, Oath or Service, Vid. Mirror des Justices. Cap. 1. § 4, 5, 7.* The Term of Crime of Majesty is not now used in our Law, but is entirely sunk and lost, and the Division in Criminal Cases now in Use is, into *High Treason* and *Petit Treason*.

High Treason is defin'd to be an horrible Offence committed against the Security of either King or Kingdom, whether it be by Imagination, Word or Deed. *Cowel's Interp.* So that it includes all those Crimes of Majesty, which *Andrew Horn* styles mortal. *Petit Treason* is when a Wife kills her Husband, a Servant his Master, &c. and includes almost all those Capital Offences, which he places under the Title of Treason.

This Division of Treason into *Grand* & *Petit* is very antient. But then it was not used to signify precisely that Sense it does now. *Britton* makes no other Use of it than to distinguish those Crimes which were punished with Death, from those which were punished by Mutilation, Pillory, or any other inferiour Sort of Punishment. His Words are, *Cap. 8.* “ *Et poit estre Tre-
son grand & pettit dount ascun demande
Jugement de Mort, & ascun Amission de
Membre & Jugement de Pillori, ou penaince
de prison, & ascun plus simple punishment
solonques la manere del fait.* *Grand Tre-
son*

“ *son est a compasser nostre Mort ou desheriter*
 “ *nous de nostre Royalmes, &c. Et si poit*
 “ *Homme faire Grand Treson versauters*
 “ *Persons en moult maneres, comme en procu-*
 “ *rant la Mort de ascun que est seisi de luy,*
 “ &c. And Treason may be either High
 “ (Grand) or Petit; of which some de-
 “ mand Judgment of Death, and other
 “ some Mutilation, Judgment of Pillory
 “ or Imprisonment, and other some more
 “ simple Punishment, according to the Pro-
 “ portion of the Crime. High-Treason
 “ is to compass our Death, or to disinherit
 “ us of our Realms, &c. And High-Trea-
 “ son may be committed against other
 “ Persons in many Manners, as, *e. g.* If
 “ any Man should procure the Death of
 “ any Person who is seised of him, &c.

§. It is evident to any Person who reads
 the ancient Books of the Law, that the
 Term Treason, as denoting a particular
 Species of Crimes, was of a very uncertain
 Sense. It appears in some Measure by
 what has been before said. And as it is not
 Words but Things that we enquire after, I
 shall not spend much Time in settling too
 critically their Sense.

It is sufficient to the Purpose of this Pa-
 per, if it can be shewn, that every Acti-
 on of considerable Consequence, which in
 Intendment of Law was look'd upon as
 prejudicial to the publick Society or Nati-
 on,

on, as such, and to have been done *animo lædendi*, has been always capitally punish'd; punish'd even as it is at this Day, by loss of Life, and Forfeiture of all Estate Real and Personal, &c.

It matters not by what Name it has been called, whether *Crime of Majesty*, or *Treason*, or *Felony*, &c. For whatever Action we can shew to have been punished in so severe a Manner, I think we may without scruple stile *High Treason*, even in the Modern Sense of the Word. The *Saxons* had no Notion of any other Treason, than that of Treachery to their Country, and deserting it in Time of Danger. They punished it with Death as soon as ever they discovered it; and even in their Supreme Councils, or to speak in the Language of the present Age, in their Parliaments, they took Cognizance of Crimes of this Nature, and as it were, attainted the Criminals. *Tacitus* says, “*Licet apud concilium accusare quoque & discrimen Capitis intendere*, and “ then adds, *Proditores & transfugas Arboribus suspendunt*. Vid. de Mor. Germa. C. 12. p. 609.

They brought these Notions with them from *Germany* into *England*; and it has been but very lately question'd, *Whether a Man could betray his Country without being a Traytor*.

Their

Their Laws (here in *England*) were remarkably Merciful, and few Crimes were among them punish'd with Death : So that doubtless those which were so, were such as they look'd upon with the utmost Horror and Detestation. The killing of any Person was in general Terms made Capital in their Laws. But then there was a Commutation allow'd of, which was regulated in proportion to the Value of the Head, or Life of the Person who was kill'd. The very killing of their *King* was not among them punished with Death, provided the Criminal was able to produce a certain Sum of Money. The Valuation of Peoples Lives in this manner, was a Thing so fixed and certain among them, that it was grown a part of their Common Law, as may appear by the Laws of King *Athelstane*, p. 55. " *Inter leg. Saxon. ad Calc. Bede Regij, Capitulis Estimatio, Jure Anglorum Comuni, Triginta Thrymsarum millibus constat.*" Which is just twice the Sum the Life of an Archbishop, or any other Nobleman, was valued at : And therefore in the Law before mentioned, it is added, by way of Reason for it, " *Quorum quindecim Millia, capitis estimationis, reliqua Regni nomine debentur; hac ad gentem, illa ad cognatos pertinent.*" This Money, which was paid upon any Person's being kill'd, was distributed among the Relations of the deceased,

to

to fatisfie them for their Loss. And the only Reason which can be collected from their Law, why the Life of their King was valued at double the Sum of another Nobleman, is that great Interest which the Publick has in the Preservation of the Prince: And their Loss being at least equal to that of his Family; the Commutation Money was therefore equally divided between them.

This was the Value the antient Saxons put upon their Kings, at the same Time that Crimes of really much less Consequence to the Society were punished with Death, &c. *Inter ejusdem* Athelf. leg. p. 47. “ *Si quis Domino suo Calamitatem struxisse accusetur, neque id legitime poterit inficiari, capitale esto.* *Inter leg. Canuti*, p. 121. “ *Cædes manifestæ, Dominorumque proditiones, scelera sunt Jure humano in-expiabilia.*” So that it seems no Commutation was allowed for these Crimes. In short, it may fairly be concluded, that what we now call High Treason, cou’d not among them be committed, but only against the Publick; since their severest Punishments were only pointed at such Crimes, which had the Publick, as such, for their Object. As a farther Proof of which, I shall recite one Saxon Law more. *Inter leges Canuti*, p. 125. “ *Si quis in Terrestri sive Navali pugna Dominum suum* (so the Word is translated by Lambard, but the
Saxon

Saxon Word is *gorefan*, and properly signifies, *a Leader in War*) “ *aut commilitonem su-*
 “ *um per ignaviam & pigritiam deseruerit,*
 “ *vitâ & rebus suis omnibus mulctator, &*
 “ *quem illi prius dederat fundum Dominus re-*
 “ *cipito, sin quæ ex scripto (boclande) prædia*
 “ *possederit, ea Regi sunt.*” This is as it
 were, the very Judgment which is now gi-
 ven in Cases of Treason; and there cannot
 be any Reason assigned why so great a Pu-
 nishment was inflicted upon such a Crime
 (as in the Times we now live, is scarcely
 counted any) but only that vast Interest
 which the Publick has in every private
 Man’s fully discharging his Duty in Battles,
 &c. and Circumstances of that Nature.

Indeed upon *Canutus*’s consenting to dis-
 miss his *Danish* Army, a Law was made
 for the farther Security of his Person, in
 some measure to recompence him for the
 Loss of his Troops ; by which an Attempt
 upon his Person was made Capital without
 any Commutation, Pag. 120. “ *Si quis sa-*
 “ *luti Regis aut Domini sui insidius tetende-*
 “ *rit, vitâ & rebus suis omnibus plectitor,*
 “ *nisi quidem triplicis ordalii questione crimen*
 “ *diluerit.* This Law was a perfect Novel-
 ty to the Saxons ; to prove which, and also
 to prevent the Reader’s imagining the Com-
 mutation, in case of killing the King, was
 only allowed where it was done by Acci-
 dent, I shall recite this Law of King *Alured*,

Pag. 24. " *Qui capiti & salutis Regis per-*
 " *fidiosè, sive solus, sive servus aut sicariis*
 " *mercede conductis, stipatus insidiabitur,*
 " *vitâ & fortunis ejus omnibus privator;*
 " *verùm si is se culpâ eximere voluerit, esti-*
 " *mationis Regii Capitis ratione habitâ, id*
 " *facito.*

It is observed by a late Learned Writer, out of the *Mirror of Justice*, p. 75. That among the *Saxons*, Plotting against the King, was but Felony: And upon the supposed Authority of that Book, he refers to an Indictment in King *Alfred's* Time, for an Offence of that nature, as concluding only *felonice*; whereas Indictments in the other Case concluded always *felonice & proditorie*. And he observes that the Punishment of the one was Loss of Life, and Forfeiture of Personal Estate only; of the other, Loss of Life, with Forfeiture of the whole Estate, both Real and Personal.

I shall only make a short Remark upon this Notion, and then hasten to the Time of the *Normans*, as being much more material towards the settling the Question now in hand. It is scarcely probable, that the Term *Felony* was in use among the *Saxons*, in a Sense any thing like what it is now among us; it is not to be found in all the *Saxon* Laws extant. The Word is of a most general Sense, and Sir *Henry Spelman's* Definition of it is certainly true, "*Felo-*
 " *nia*

“ *nia est culpa seu injuria propter quam Vas-*
 “ *salus amittit feudum.* The Etymology
 of the Word expresses this Sense ; for it may
 be derived from the *Saxon* Word (*Felen*) to
 mistake, to commit a Crime, &c. or else
 from the Word (*Feah*) which signifies Mo-
 ney, Wages, and even an Inheritance, and
 (*Lon*) which in the *German* Tongue signi-
 fied a Price. It is visible that Treason is
 within this Sense of the Word, as much as
 any other Crime, which creates a Forfeiture :
 For as to the different Conclusions of
 the Indictments, *felonicè*, or *felonicè & pro-*
ditoriè, it seems to be an Observation found-
 ed wholly upon modern Practice. And
 whoever reads Dr. *Hickes's Dissertatio Epi-*
stolaris in Thesaur. Ling. Septent. will easi-
 ly believe, that the Pleadings and Acts of
 Court among the *Saxons* were not in *Latin*.
 He recites several Acts of several County-
 Courts, as of *Hereford*, &c. every one of
 them in the *Saxon* Language. It was a
 considerable time before the Word *Felony*
 was used in so precise a Sense, as it is now ;
 and High Treason was frequently compre-
 hended under it, even since the Conquest.
 It is certain from both *Glanvill* and *Britton*,
 that *Falsifying the Great Seal* was High
 Treason at the Common Law ; and yet
M. 1. E. 3. Pl. 13. a Man being arraigned
 for having falsified the Great Seal, pleaded
 a Charter of Pardon *de tous Felonyes* ; and

it was allowed him. As to what is observed concerning the Difference of the Judgments, it is a manifest Error; since, among the Saxons, the Punishment of *Murthers, Burglaries, Robberies, &c.* was commuted for a certain Sum of Money, which they call'd *Weregild*: And this Law continued until the Reign of *Hen. 1.* by whom it was abrogated. "*Et is primum suspendium furibus indixit. Vid. Floren. Wigorn. pag. 653. & Roger Hoveden inter Scriptores post Bedam, pag. 471.*"

The *Normans* with great Justice improv'd upon the Laws of the *Saxons*: They consider'd the *Crown* as the *Center*, in which all the Members of the Commonwealth were united and knit together: And an Attempt upon the Person of the Prince cou'd not be look'd upon but as tending to dissolve that *Union*, and consequently to reduce the State into Confusion; therefore was it made equally capital with those Crimes, which related only to the Kingdom. And this appears by all the old Books. *Glanv. lib. 14.* "*Accusatore in Curiâ probante certissimè, se scivisse ipsum accusatum machinatum fuisse, vel aliquid fecisse, in mortem Regis, vel seditionem Regni, &c. Bracton, lib. 3. pag. 118. " Si quis ausu temerario machinatus sit in mortem Domini Regis, vel aliquid egerit, seu agi procuraverit, ad seditionem Domini Regis vel Exercitus sui, &c.*"

It

It is to be observed, that *Bracton* did not intend this for an entire Definition of Treason, since he just before uses these Words :
 “ *Habet enim crimen lesæ Majestatis sub se*
 “ *multas species, quarum una hæc est, ut si*
 “ *quis, &c. Fleta, lib. 1. pag. 31. says,*
 “ *Quisquis sit de crimine lesæ Majestatis ac-*
 “ *cusatus, defendere se debet sic; omnem felo-*
 “ *niam defendit, omnemque subductionem Re-*
 “ *gis, Regni, vel sui Exercitûs, &c. Hen-*
 “ *gham magna, cap. 1. pag. 7. “ Constat*
 “ *quòd placita de crimine lesæ Majestatis,*
 “ *ut de Nece vel Seditiõne Personæ Domini*
 “ *Regis, vel Regni, vel Exercitûs, &c. ad*
 “ *Curiam Regis majorem pertinent, &c.* By these Quotations, and what has been before said, it appears that the *Normans* coupled Crimes against the publick Safety, and against the Persons of their Princes, together : And indeed in Reason it is not possible to separate them ; for as the Murther, &c. of a King, must necessarily involve a State in Confusion, so every Action which endangers the Safety of the Publick, must necessarily diminish the Majesty of the Prince. And this may be esteemed a just Reason, why all Crimes of this nature are by Intendment said to be committed *contra Coronam & Dignitatem Regis*. The very Term, *King*, bears a necessary and indissoluble Relation to a Kingdom ; and therefore the Safety, &c. of a People must be

the chief Interest of every *King*, as such. And the Crown or Prince always prosecutes Crimes of this nature (perhaps) because the Crown, as has been said, is always considered as the Center of Union, and as it were the single Principle of *Activity* in the Society.

It is not difficult to believe, that Judges, &c. who were entirely at the Disposition of the King, should be more zealous in the Prosecution of such Crimes, which particularly affected the Interest or Person of the *Prince*, than of those which related immediately to the *Publick*, *as such*, and were very often distinct from, nay sometimes perfectly opposite to, what a weak *Prince* might by the Advice of a *corrupt Ministry* look upon to be his Interest.

Their carrying this Principle on with too high a Hand, made it become a very great Grievance to the People, and was the true Reason of the Enacting the Act of 25^o *Ed. 3. de Proditionibus*, as will be more particularly shewn, when we come to consider that Statute.

1. What I shall now in the first place endeavour to shew, is, that before 25 *Ed. 3.* was made, the Parliament did take upon them to punish such Crimes, which were committed against the Safety of the Publick, as Treason. And I presume no Man will deny, that Custom, which is the *Law* of
Parlia-

Parliaments, is as much the *Law* of the Land, as any thing that has been the constant and uninterrupted Doctrine and Practice of *Westminster-Hall*: For whatsoever is the *Law* of the Kingdom, is as much *Law*, as any thing else that is so; and whatsoever is *Law* cannot *suscipere magis aut minus*, but it must be all of equal Authority. *Vid. Vaugh. pag. 21. & alibi.* In order to this, let us examine how our Ancestors behav'd themselves in respect to Ministers, whom they felt to be the Plagues and Scourges of their Country; and I doubt not but upon the Issue it will appear, that *Treason*, by the Law of *England* in Parliament, is exactly what the Civil Law defines it to be; *scil. Quodcumque quis fuerit molitus contra Imperatorem vel Rempublicam, crimen est Majestatis.* *Vinii Inst. pag. 883.* Forms of Law, and Niceties in the Proof of Facts, which they all experimentally knew to be true, did not hinder them from doing themselves that Justice, which every *injured People* have a Right to exact; and which is absolutely necessary to preserve a Nation from the Insults and Oppressions of Ministers, who by their Interest and Credit with their Sovereign raise themselves above the Fear of Punishment in the ordinary and common Proceedings of the Law.

I shall not in my Citation of Precedents go beyond those Times, of which we have

Records extant. The common Historians, it is true, give us an Account of several Persons who died as Traytors in different Reigns; but there not being any Records, whereby we might indisputably demonstrate the Truth of such Histories, a great many Persons would perhaps think their Authority too weak a Foundation to build upon, in the Examination of a Point in Law of so great Consequence as this.

The Reign of *Ed. 2.* will it self furnish us with Instances sufficient of the Vigour and Bravery of our Ancestors. Let it not be objected, as it has often been to the Reign of *Rich. 2.* &c. that the Times were in great Confusion, and therefore Things were not then carried regularly, and according to the Forms of Law: For when shou'd we expect to find Precedents of *Parliamentary Justice* upon Ministers who were guilty of Treasons against the Publick, and perhaps were supported by wrong and *dangerous* Notions of *Prerogative*; but in those only Times which *can possibly afford them*? When good and wise Princes govern'd, how cou'd there be any Dispute between *Court* and *Parliament*? But when wicked Ministers *seduc'd their Sovereigns* into dangerous and illegal Measures, it was then only that *Parliaments* could exert themselves in *Vindication* of their *Liberties*! When Princes *defended* their Favourites
from

from the Justice of the Nation, it is then, and then only, it can be expected that *Parliaments* should assert their Authority, and resolve to do themselves Justice! When that has been obtain'd, the Confusions ceased, and Things have naturally return'd into their legal and accustomed Channel.

The Judgments which were given against *Gaveston*, and the two *Spencers*, have been approved as just in every succeeding Age; and yet were their Case to be try'd according to the Principles which are now contended for, it would be found very difficult to convict them of any Crime worthy of Death. *Peter de Gaveston* was a debauched flagitious Person, who for his Misdemeanours, and corrupting Prince *Edward*, (with whom he was educated) was *Anno 1306*, 8^o *Regn. Ed. 1.* 33. in Parliament banish'd the Kingdom, *de communi Assensu procerum*. But this King was no sooner dead, and the Crown descended to *Ed. 2.* than he was recall'd from his Exile, and before he could return home, the King even prevented his Wishes, with the greatest Grant that ever was made to a Subject. The King himself, so hasty was he to shew his Affection to his Favorite could not stay for his Return from *Scotland*, where he was when the King his Father dy'd, but by Letters Patents, which are dated *apud Dumfreis*, 6 *Aug. Anno Regn. 1.* he granted to him
and

and his Heirs the whole County of *Cornwall*.
Vid. Rymer's Fæd. Tom. 3. p. 1. His excessive Grants were objected to *Gaveston* as a Crime; and yet the Letters Patents of this very Grant (which was by far the greatest) were witnessed and attested by the prime Nobility of the Kingdom. For they are, *Cum hiis testibus, Henrico de Lacy Com. Lincoln, Thoma Com. Lancastri, the Kings Uncle,* and several others, who afterwards appear'd in the Field against him. Nay the King himself, in his Letters to the King of *France* and to the Pope, affirms that Grant to have been made, "*de voluntate, concilio & consensu, & ad procurationem Comitum, Baronum, & Procerum Regni, ipso Petro de Gaveston hoc ignorante.*" The Letters are dated, *apud Windshor 16 Juni Anno Reg. 1. ib. p. 90.* *Rymer's 3 Tom. Ann. 1, 2, 3, 4, Ed. 2.* is full of Papers relating to this *Peter de Gaveston*. By which it is manifest he was the greatest Favourite that ever Prince had (unless his Successors in Favour, the two *le Despensers* are to be excepted.) He by his pernicious Counsels led the King into such Measures and Difficulties, that the *Parliament* could not but take Notice of them, and *Anno 5. Reg. Ed. 2. Commissioners* were in full *Parliament* authorized under the great Seal to manage the Affairs of the Kingdom, and to put the King's Expences, and Method of Government, into

to some Form and Regularity. These Commissioners were known by the Name of the *Ordeinors*, and by Reason that what they did was by Authority of Parliament, their Resolutions and Ordinances are entered upon the *Parliament-Roll*, among the rest of the Parliamentary Proceedings, and were in Fact observed as an Act of Parliament. And the *Sheriffs of Counties*, who were antiently elected in their Counties, came first to be nominated by the Chancellor, Treasurer, &c. by Vertue of an Article in their Ordinances. *sc.* “ *Estre ceo*
 “ *nous ordeinoms que Viscounts soient desor-*
 “ *mes mis par le Chancelier & Tresorer &*
 “ *les autres du Conseil qui serront present,*
 “ *& si le Chancelier ne soit present, soit mis*
 “ *par le Tresorer & Barons del Exchequer,*
 “ *&c.* We farther Ordain, that for the fu-
 “ ture, the Sheriffs be put in by the Chan-
 “ cellor, Treasurer, and such others of the
 “ Council, who shall be present ; but if
 “ the Chancellor shall not be present, let
 “ them be put in by the Treasurer and
 “ Barons of the Exchequer *, &c. Which
 is an Instance of the great Authority of
 these Ordeinors, since they could cause so
 considerable an Alteration in the *Common-*

* Lord Chief Justice Coke refers this Alteration of the Law, to the Statute 9 Ed. 2. and takes no Notice of any of these Ordinances.

Law; and this very Article was afterwards so much approved of, that it was 9 *Ed. 2.* turn'd into a formal *Statute*, and is printed in the Book. The Statute 12 *R. 2.* is in Substance the same with this Article, only there are more Officers mention'd, as of Necessity to be present at the Nomination, than there are either in the Article or the Statute of *Ed. 2.* *Vid. Coke 2. In. p. 175.*

Their *Ordinances* are very remarkable, and well worth reading from the Beginning to the End; but it would too much fill this Paper to transcribe the whole *Record*, and for that Reason I shall mention but one more Article besides what I directly quoted it for; and that is this, *Art. 9.* “ *Pur ceo que le Roy ne doit entreprendre fait de Guerre contre nully, sans common Assent de son Barnage, pur mults perils que purront avenir a luy, & a son Realme, Nous ordeinoms, que le Roy desormes ne aile hors de son Realme n'emprenge contre nully fait de Guerre, sans common Assent de son Barnage, & ceo in Parliament; Et si autrement face & sur cela emprise face sonondre son Service, soit le Samon pur nul, &c.* Whereas the King ought not to undertake any Act of War against any Person, without the common Assent of his Baronage, by Reason of many Dangers which may thereby happen to him-
self

“ felf and to his Realm; * *We therefore ordain,*
 “ That for the future the King do not go
 “ out of his Realm, nor undertake any Act
 “ of War againſt any Perſon without the
 “ common Affent of his Baronage, and
 “ that in Parliament. And if he ſhall Act
 “ otherwiſe, and upon any Enterprize
 “ which he ſhall have in View, ſhall cauſe
 “ thoſe who hold of him by any Service,
 “ (*viz.* Military) to be ſummoned to at-
 “ tend him, let ſuch Summons be null. I
 do not make any Reflections upon this ſur-
 prizing Clause, but think it to be worth
 obſerving, that in this Clause the Ordei-
 ners did not only inſtitute, that for the future
 the King ſhould not undertake any War
 without the Conſent of his Baronage, but
 they recite it as part of the Law *then al-*
ready in being (which it is not probable they
 would do in ſo publick a manner unleſs it
 was notoriously ſo) for the Clause begins,
Whereas the King ought not to undertake,
&c. We therefore ordain, &c. So that were
 thoſe Perſons, who now plead nothing elſe
 but the *Royal Prerogative* to juſtify them-
 ſelves for having made the moſt pernicious
and deſtructive Peace that ever Nation ſuf-
 fered, to be try'd before a *Parliament*, of
 Sentiments like to that of which we now
 ſpeak,

* Vid. L' Stat. 1 $\frac{2}{3}$ W. 3. Ca. 2, Section 3.

ſpeak, I believe it would not be a long Debate, whether they ſhould be puniſhed capitally or not.

The other Article which I intend to tranſcribe, belongs entirely to this *Peter de Gaveston*, and contains all the Articles upon which he was condemn'd, together with the *Judgment of the Ordeinors* thereupon, &c.

If any Reader deſires to examine this Record, or any other to which I may refer, it may be of Service to him to let him know there is a tollerable fair Copy of the *Parliamentary Records* in the *Inner Temple Library*, which were left to the Society by the late learned Mr. *Petty*. It is a Copy that I think may be depended upon, becauſe at the end of the Volumes there is a *Convenit cum Recordo*, attested under the Hands of the Clerks who tranſcrib'd and examined them.

Rot. Parl.
5. E. 2. “ Pur ceo que connue chose
“ eſt, & par le Examinement
“ des Prelatz, Counts & Ba-
“ rons, Chivalers & autres bonns Gentz
“ du Royalme, trovez, Que Pierre de Ga-
“ veston, ad mal-menez, & mal conſeillez no-
“ ſtre Seigneur le Roy, & l'a enticee a mal
“ faire en divers maneres & deceivances.
“ En accoillant a luy tout le tresor le Roy,
“ & l'ad eſloigne hors du Royalme. En at-
“ treant a luy Royal poer & Royal dignites
“ comen alliance faire de Gentz par Seremens

“ de

“ de vivre & mourir ouesque luy, enconunter
 “ toutz gentz, & ceo par le tresor que ill
 “ purchase de jour en jour, enseigneurant sur
 “ l’Estate l’Roy & de la Coronne, en destructi-
 “ on du Roy & du Peuple; & especialment
 “ enloignant le Coer le Seigneur de ses liges
 “ Gentz en despisant leurs Counseils. Nient
 “ soeffrant bones Ministers faire ley deterre,
 “ en ostant les bons Ministers mettant ceux de
 “ sa Coviegne, aux ibien aliens come autres,
 “ qui a sa volunte & a son comandement offen-
 “ dent droit & ley de terre. En parnant terres,
 “ tenements & Baillies du Roy a luy & a ses
 “ Heires. Et ad fait que le Roy ad done
 “ terres & tenements de sa Coronne as divers
 “ gentz, a grant damage & descresce de le
 “ State le Roy & de sa Coronne; & ceo ausi
 “ bien puis l’ordeignment que le Roy grant a as
 “ Ordeinors de faire, au profit de ly & de son
 “ Peuple, come devant; enconunter l’ordeign-
 “ ment des Ordeinors. Et maintient Robbeours,
 “ Homicides, &c. & les fait avoir le Char-
 “ tre le Roy de pees, endonnant hardement a
 “ misfesours de pis-faire. Et menant le Roy,
 “ enterre de guerre sans common Assent de
 “ son Barnage, en peril de son Corps, & en
 “ destruction du Royalme, Et en fesaunt
 “ sealer blanches chartres, de sous le grant
 “ Seale le Roy, en deceit & distreritance le
 “ Roy & de sa Coronne & enconunter son ho-
 “ mage. Et felonessment, fausement &
 “ traieroussment ad fait les choses susdites, a
 “ grant

“ grant dishonour & damage du Roy, &
 “ desheretison de la Couronne & a destru-
 “ ction du People en moltes Maneres,
 “ & ovesque ceo nous eant regard, &c.
 “ Whereas it is notoriously known, and
 “ by the Inquiry of the Prelates, Earls,
 “ and Barons, Knights, and other good
 “ People of the Realm, it is found, *That*
 “ *Peter de Gaveston* has evilly advis’d and
 “ counsell’d our Lord the King, and has
 “ entic’d him to do Evil in divers Manners.
 “ *That* he cheated the King in his Treas-
 “ ure, and sent it beyond the Seas. *That*
 “ he encroached to himself Royal Power
 “ and Dignity, in making People engage
 “ themselves by Oaths to live and die with
 “ him against all Men; all which he effect-
 “ ed by Means of the Treasure which he
 “ daily procured, Lording it over the Estate
 “ of the King, and of the Crown, to the
 “ Destruction of the King, and of his Peo-
 “ ple. *That* he especially alienated the
 “ Heart of the Lord (*the King*) from his
 “ Lieges, and caused him to despise their
 “ Councils. *That*he did not suffer good
 “ Ministers to execute the Law of the Land,
 “ by displacing such good Ministers, and
 “ employing those of his own Confedera-
 “ cy, as well Aliens as others, who at his
 “ Will, and his Commandment, act con-
 “ trary to Right, and the Law of the Land.
 “ *That*he took Lands, Tenements, and
 “ Farms,

“ Farms, from the King to himself, and
 “ his Heirs (*i. e.* a Fee Simple.) *That* he
 “ caus’d the King to grant Lands and Te-
 “ nements of the Crown, to several Peo-
 “ ple, to the great Damage and Decrease
 “ of the Estate of the King and of his
 “ Crown. And this he did as well since
 “ the Ordinance which the King granted
 “ to the Ordeinors to make for the Benefit
 “ of *himself and his People*, as before, con-
 “ trary to the said Ordinance of the Ordein-
 “ ors. *That* he supports Robbers, Mur-
 “ therers, &c. procuring for them the
 “ King’s Charters of *Pardon*, by which he
 “ encourages Evil-doers to do worse.
 “ *That* he carried the King into a Land
 “ of War without the common Assent of
 “ the Baronage, to the Peril of his Body,
 “ and to the Destruction of the Realm.
 “ *That* he caused the Great Seal to be put
 “ to Blank Charters (*The Word seems here*
 “ *to signify any Letters Patent, and is not*
 “ *confin’d to any particular Sense*) in De-
 “ ceit and Disinheritance of the King and
 “ of his Crown, and against his Homage;
 “ *feloniously, falsly and traiterously* he did
 “ the Things before-mentioned, to the
 “ Dishonour and Damage of the King,
 “ to the Disherison of the Crown, and
 “ Destruction of the People in many Man-
 “ ners. To which we having Regard,
 “ &c. And then they recite how that by

the Ordinance of King Ed. 1. he had abjur'd the Realm, and that the King himself (then being Prince) did at the same Time abjure the Company of the said *Peter de Gaveston* for ever. They farther recite, that since that Abjuration, “ *Par commun Assent de tout le Royaulme & du Roy* “ *& de ly meme Prelatz, Countees & Barons*”. That by the common Assent of “ the whole Realm, and of the King, “ and of the said Prelats, Earls, and Barons, &c. he was for ever banish'd the Kingdom, and that his return into it was not by common Consent, but the Contrivance of particular Persons, to the great Prejudice of the People. “ *Per queleschuire nous ordeinoms, par Vertue de la Commission nostre Seigneur a nous grant, que Piers de Gaveston, come appiert Ennemy le Roy & de son People*; to avoid which we “ ordain, by Vertue of the Commission of our Lord unto us granted, That *Peter de Gaveston*, as he appears an Enemy of “ the King and of his People, &c. be for “ ever banished out of all the King's Dominions, and if he shall ever return into the “ *Seignury le Roy adunque soit fait de luy, come del Ennemy du Roy, du Royaulme & de son People*, Seignory of the King, “ then let it be done unto him, as unto the “ Enemy of the King, of the Kingdom, “ and of the People, &c.

These Articles are charged upon him for Treason. Yet it would be difficult for those People who are Friends to the late *Ministry*, consistent with the Principles they lay down, to prove any one of them to be such: So that if any Treason be in them, it must be *accumulative*. For what do these Articles amount to? Why, *First*, He gave bad Counsel to the King, and appropriated to himself a great Part of the *Royal Treasure*. I believe no Man who has been a *Treasurer*, will be willing to think this more than a *Breach of Trust*, a *Misdemeanour*, or something of that *Nature*. Tho' the *Crimen peculatûs* has something of a deeper Guilt in it now, when the Pillage is of Money given by the publick, and appropriated to particular Uses (which makes the Crown to be in Subsidies of this Nature only as it were a *Common Trustee*) than when the *Robbery* cou'd extend no farther than the cheating the King of the Rents and Profits of his *Demesnes*. 2. He procur'd People by a liberal Distribution of his Money, to engage themselves by Oaths to live and die with him. The People who have been so industrious in raising the late *Mobs*, to give such hearty *Declarations* in their Favour, cou'd they have *constru'd* this to be *Treason*. 3. He *alienated* the King's Heart from his Nobles, making him to despise their Counsels, and to turn out *good*

Ministers, and to put in *bad ones* of his own *Confederacy*: This seems to want no *Application*. 4. He took Grants of Land from the King to himself and his Heirs. It has been already shewn, that the Grant of the Earldom of *Cornwall*, was almost *Parliamentary*. 5. He procured Grants of Lands to several other Persons, to the *Destruction of the Crown*. 6. He also procured Charters of Pardon to several *Murderers*, *Robbers*, &c. to the emboldening of wicked Men. How! could this be *Treason* in *Gaveston*, and not so in *Walter Reynolds*, *Bishop of Worcester*, who was then *Keeper of the Seal*, and upon whom it was incumbent, *ex Officio*, to see that nothing illegal should pass the Seals? and yet he was never call'd to Accompt, or questioned for these Things. Besides, is not the King's Power of *pardoning Criminals* as clear a Branch of the *Prerogative*, as that of making *Peace and War*, or the creating a *Dozen of Peers* in the *midst of a Session*, in the *midst of a Debate*. What then was his Crime? Why! it was certainly that *Abuse* of the Royal *Prerogative* which he advised the King to exercise. For when Mercy is so indiscreetly used, as to give Encouragement to Offenders, by taking away the Fear of Punishment, it becomes a Grievance and Cruelty to the rest of the World. And is not an *Attempt* to render one Branch
of

of the *Constitution* *useless*, as fatal an *Abuse* of the Prerogative, as the pardoning a few Criminals : For it is absurd to think, that *either House* can ever with Success, oppose it self to the Designs of a Court, if an *extempore Creation* of a Majority can be *justified*.

I shall not recapitulate any more of the Articles against him, but leave the Reader to make such Observations upon them as he thinks fit. Every one knows how the Affair of this *unhappy Earl* ended. He after his Exile ventur'd to return into *England* without the Permission of the Barons, trusting to the Protection of the King; which the Barons resenting, immediately took up Arms, and *forced both the King and Gaveston* to fly to the Castle of *Scarborough*, where the King left him, whilst he himself went to gather a Strength for his Relief : But the Barons took the Castle before it cou'd be reliev'd, and carry'd *Gaveston* to *Dadington*, where *Guy, Earl of Warwick*, ordered him to be beheaded, *tantum legum Regni subversorem & publicum proditorem communi Judio*, Vid. Thom. Walsing. Ypod. Neus : Int. Ang. & Norm. p. 501. ac etiam ejus, Histor. p. 101.

It is remarkable in this Case, that the *Earl of Lancaster*, and several other Persons, who, as was before observed, were Witnesses to the Grant of the Earldom of

Cornwall, were the Chiefs of the Party who pursued him to his Death; and after his Death, they carried the Matter with so high a Hand, that *Anno 1313. Ed. 2. 7.* they obliged the King to consent to an Act of general Pardon to all those who had been concern'd in the Death of *Gaveston*, Rot. Par. 17 E. 2. p. 1. M. 14. So far was the King from being able to revenge it.

In *Rymers's Fæd.* Tom. 3. p. 448. there is even the King's general Release to the Barons for all such Jewels, or other Moveables of his own, which they might have taken or destroyed in their pursuit of *Gaveston*.

The *Two Spencers* succeeded to *Gaveston* both in Favour and Insolence, and *Anno 15 Ed. 2.* they were condemned of High Treason by the *Lords in Parliament* (without the Consent of either *Prelates* or *Commons*) who only consented to the Act for their Banishment after the Judgment given. The Articles upon which they were condemned are very remarkable, but too long to be inserted in this Paper in the Original Language, The Substance of them, as near as I can collect them, is as follows.

Al Honour de Dieu, &c. 1. " That Sir
 " *Hugh*, the Son, drew a Writing, where-
 " by he endeavoured to engage Sir *John*
 " *Gifford*, and others, in a Conspiracy, to
 " force

“ force the King to do whatsoever he wou’d have him.” To support this Accusation, there is in the Articles inserted the Copy of a Writing which I here literally translate, that every Reader may for himself, judge how far it will justifie, and prove a Charge of High Treason.

“ *Sc. Homage*, and the *Oath of Allegiance*, are more by reason of the *Crown*, than of the *Person* of the King; Which appears, for that before the *Crown* descends, there is no Allegiance due to the *Person expectant*: Wherefore in Case the King carries not himself by *Reason* in Right of the *Crown*, his Leiges are bound by *Oath made* to the *Crown*, to remove the King, and the State of the *Crown by Reason*, and otherwise the *Oath* ought not to be observed. But it may be ask’d, how the King in such a Case is to be dealt with, *by Suit at Law*, or by *Force (par Suite de ley ou per aspertee)* by *Suit at Law* a Man can have no Redress, for he can have no Judge but by the King. In which Case, if the *King’s Will* be not according to *Reason*, nothing but Error wou’d be maintained and confirmed; wherefore to *save their Oath*, when the King will *not Redress* what is injurious to the People, and prejudicial to the *Crown*, they ought to *proceed with Rigor*, for he is bound by

D 4

“ *Oath*

“ *Oath to govern his People, and his Leiges*
 “ *are bound to govern in aid of him, and*
 “ *in default of him.*

2. “ That by their evil Counsel they
 “ caused the King never to grant his Pre-
 “ sence (which he by Right ought to do
 “ to his great Men) nor any Petitions but to
 “ such Persons as they thought fit: Which
 “ was contrary to the King’s Duty and
 “ Oath.

3. “ That they will not suffer the Great
 “ Men, *nor good Counsellors to approach the*
 “ *King*, to give him Counsel, by which
 “ they usurp’d to themselves *Royal Power*
 “ *and Authority* over the Person of the
 “ King, to the great Dishonour and Dan-
 “ ger of the Realm.

4. “ That in Order to attain their
 “ wicked Purpose, and to the Disinherit-
 “ tance of the Great Men, and Destruction
 “ of the People, they put out good and a-
 “ greeable Ministers who *were placed by*
 “ *Assent*, and put in others false and wicked
 “ of their own Party.

5. “ They maliciously advised the *King*
 “ *to raise Arms against his People in Glou-*
 “ *cestershire*, contrary to the *Great Char-*
 “ *ter*, and the Award of the Peers of the
 “ Land.

6. “ Whereas the Earl of *Hereford*, and
 “ Lord *Wigmore*, were assign’d by the
 “ King to make War upon *Llewellyn Bren*,
 “ who

“ who surrendered himself to those Lords
 “ at the King’s Grace and Pleasure. The
 “ said Sir *Hugh*, Father and Son, accroaching
 “ to themselves Royal Power and Authority,
 “ took the said *Lleuellin* out of the
 “ Lords Hands, and carried him to their
 “ Castle of *Cardiff*, where pretending a Jurisdiction
 “ which they had not, they caused him to be hang’d,
 “ drawn, beheaded, and quarter’d.

7. “ That they evilly advised the King
 “ to take into his Hands, the Lands of Sir
 “ *Hugh Audelye*, the Son, who was forejudg’d
 “ without Process, contrary to the Law of the Land.

8. “ Whereas the King had granted by
 “ Letters Patents to the Earl of *Warwick*,
 “ in full Parliament, that after his Death
 “ his Executors should have his Lands till
 “ his Heir was of full Age; they caused the King,
 “ without Cause, to repeal, and by their evil
 “ Counsel defeated what the King had granted
 “ in Parliament, to the Dishonour of the King,
 “ and against Reason.

9. “ That they would not suffer the King
 “ to take reasonable Fines of the Peers, &c.
 “ when they entred upon their Fees, as
 “ had been used before that Time: Making
 “ the King to do against his Oath in Parliament.

10. “ That

10. “ That by wicked Covetousness,
 “ and *Royal Power*, they will not suffer
 “ the King to hear, or do Right to the
 “ Great Men, upon what they present un-
 “ to him touching the disheriting the
 “ Crown, and them, as to the Lands
 “ which were *the Templars*. Also by *u-*
 “ *surped Power Royal*, they govern’d the
 “ King, his Council, and his Prelates, to
 “ the Damage and Dishonour of the King,
 “ the Peril of his Oath, and the Destruction
 “ of his People.

11. “ Also, that no Bishops, &c. Elect,
 “ who ought to be received of the King
 “ when duly elected, cou’d come near him,
 “ or obtain any Favour from him, until
 “ they had paid a Fine to the said Sir *Hugh*,
 “ Father and Son; neither cou’d any one
 “ else obtain any Favour from the King
 “ without paying a Fine unto them. *Up-*
 “ *on these Articles Judgment was given a-*
 “ *gainst them in these Terms.*

“ Which Wickednesses are notorious
 “ and true, as it is found by the Exa-
 “ mination of the Earls, Barons, and
 “ other Peers of the Land: Wherefore
 “ we Peers of the Land, Earls, and
 “ Barons, in the Presence of our Lord
 “ the King, do award, That *Hugh le*
 “ *De Spencer*, both Father and Son,
 “ shall be disherited for ever, as Dis-
 “ heritors

“ heritors of the Crown, and Enc-
 “ mies to the King and his People ;
 “ and be banished the Kingdom of
 “ *England*, never to return again, un-
 “ less it be by the Assent of the King,
 “ and by the Assent of the Prelates,
 “ Earls, and Barons in Parliament
 “ duly Summon’d. And if they are
 “ found in *England* after that Day ;
 “ (*sc.* the Day appointed them for avoid-
 “ ing the Realm) or if they return’d
 “ after that Day, then to be done unto
 “ as unto the Enemies of the King
 “ and Kingdom.

N. B. This in the printed Copy is called
Exilium Hugonis le De Spencer patris & fi-
lii, Old Stat. per Berthelett, 1540.

I shall not waſt the Reader’s Time in
 making Observations upon these Articles :
 The same might be made almost, as upon
 those against *Gaveston*.

The *Spencers* maintain’d their Ground
 however, by Vertue of their Credit with
 the King (notwithstanding the Judgment
 upon these Articles) about Four Years lon-
 ger ; for it was not till the 19^o *Ed. 2.* that
 they were put to Death. The *Queen*, and
Prince Edward, afterwards King *Edward 3.*
 in that Year came over from *France*, whe-
 ther they had retired, and maintain’d a kind
 of War against *Ed. 2.* wherein they had the
 better,

better, and pursued *Hugh Spencer, the Fa-*
ther, to *Bristol*, where he was taken and
 hang'd, drawn and quarter'd as a *Traytor*,
 if you will believe *Daniel*, without any
 Form of Law. *Spencer* the younger, who
 was taken Prisoner at the same Time, was
 arraigned for Treason before Justice *Trussell*
 in a peculiar sort of Form, which was by
 way of Speech made against him. The
 Substance of which, as I have been able to
 contract it, is as follows; *sc.* “ *Hugh le De*
 “ *Spencer, in the Parliament held at West-*
 “ *minster* in the 15th Year of the King that
 “ now is, your Father and you were ad-
 “ judged to be *Traytors*, and *Enemies to the*
 “ *Realm*, and were banished as such, ne-
 “ ver to return without the consent of King
 “ and Parliament duly summon'd; contra-
 “ ry to which Award, your Father, and
 “ you, have been found in Court without
 “ Warrant. And you *Hugh*, as you re-
 “ turn'd into the Kingdom, did feloniously
 “ rob Two Merchant Ships (* *Droman-*
 “ *des*) to the Value of 40000 *l.* After
 “ this Felony you came to the King, and
 “ caused him to take *Arms against Peers* of
 “ the *Realm*, &c. contrary to the *Great*
 “ *Charter*. And also accroaching to your
 “ self Royal Power, you and your Adhe-

* Q. de hoc Vocabulo.

“ rents did feloniously rob the good Peo-
 “ ple of the Realm. And by means of *An-*
 “ *drew Harley*, and other Traytors, you
 “ murthered the good *Earl of Hereford*,
 “ and several other Persons at *Burrough-*
 “ *bridge*. And did there cause to be taken
 “ the most honourable Lord *Thomas*, the
 “ good *Earl of Lancaster*, whom by a *false*
 “ *Record against Law*, and the *Great Char-*
 “ *ter*, you caused to be murthered, martyr-
 “ ed, and put to Death. Also in the same
 “ Place you caused several other Barons and
 “ Knights to be hang’d, drawn and quar-
 “ ter’d, contrary to Law, and the Great
 “ Charter, in order to get their Estates.
 “ You also advised the King to an Expediti-
 “ on into *Scotland*, where he lost 20000
 “ Men, to the Dishonour and Damage of
 “ the Realm.

“ *Hugh*, this Treason and Tyranny
 “ would not satisfie you, but by Royal
 “ Power gain’d over the King, you de-
 “ stroyed the Franchises of Holy Church,
 “ taking the Possessions of the Church to
 “ your own Use. And whereas you knew
 “ that God had wrought several Miracles
 “ by the good *Earl of Lancaster*, whom you
 “ had caused to be murthered, you placed
 “ Guards upon the Church where he was
 “ buried, that none might enter to Wor-
 “ ship God, and his Saints. You after this
 “ advised the King to grant Lands to the
 “ Earl

“ Earl of *Winchester*, and several other
 “ Traytors, to the Disherison of the Crown.
 “ You also gave a great Sum of Money to
 “ your Adherents in *Guyenne*, where the
 “ Queen and her Son then were, to destroy
 “ them. *Hugh*, your Father, and your
 “ self, and several other Traytors, did by
 “ Force oblige several Persons to Swear,
 “ to Support and Maintain you in your
 “ Quarrels, &c. You at the same Time
 “ knowing such *Confederacies to be False*
 “ *and Traiterous*. And whereas you and
 “ the other Traytors knew that the Queen
 “ and Prince were arrived in the King-
 “ dom, you caused the King to withdraw
 “ himself out of the Kingdom; you felon-
 “ ously taking with you the *Treasure* of the
 “ Realm, *contrary to the Great Charter*.
 “ *Hugh*, you are found to be a Traytor,
 “ wherefore all the good People of the
 “ Land by common Assent do Award, that
 “ you are found as a Thief, and therefore
 “ shall be hang’d: As a Traytor, and there-
 “ fore shall be drawn and quarter’d. And
 “ for that you have been outlawed by the
 “ King and Parliament, you shall be behead-
 “ ed. And for that you have abetted, and
 “ created Disturbances between the King
 “ and Queen, and others of the Realm, you
 “ shall be embowelled, and your Bowels burn-
 “ ed. Withdraw Traytor, Tyrant, and
 “ go take your Judgment, attainted, wic-
 “ ked

“ ked Traytor.” Upon this he was immediately executed, by Vertue of the *Act of Banishment and Attainder* which had passed against him; for when this Remarkable Speech was made against him, there was no Trial had either by Common Jury, or by Peers; he being then *Earl of Gloucester*, Vid. *Henricum de Knighton de event. Angl. infr. Scrip.* 10 Co. 2547. The Barons in both these Disputes got the better of the Royal Favourites, but yet it cost several of the most considerable of them their Lives; among whom, the chief Man was *Thomas Earl of Lancaster*, whom 15 Regni Ed. 2. the King got into his Power, and beheaded at *Pomfrett Castle*. The whole Record of the King’s Proceedings against him is printed in *Rymer’s 3d Tom. p. 936.* and very well deserves to be read by Persons who are Curious in Things of this Nature.

However fatal these Disputes were to the Barons concern’d in them, yet their Country did afterwards sufficiently testify their Approbation of all their Proceedings; for that Judgment against the *Earl of Lancaster*, was in the succeeding Reign revers’d as *illegal*; and the common People express’d so great a Veneration for him (that according to the Humour of the Age) they believed Variety of Miracles which were reported of him, and *Anno 1389* he was *canonized for a Saint*; upon much better Reasons than
any

any had been for *some Hundreds of Years* before him, since he died a *Martyr* to the *Liberty* of his Country.

4 Ed. 3. Roger Mortimer was by the Lords, &c. in Parliament, *attainted* of Treason, and executed. The Rolls upon which his particular Treasons, Felonies, &c. are entred, is (as Mr. Prynne informs us) so mouldred, that a great part of it cannot be read, for which Reason the following Articles against him are transcribed out of *Henry de Knighton, de Even. Angl. Coll. 2556. infra Scrip. decem.*

1. “ *Primierement. Que par la ove ordeine fuist al Parlement de Londres prochain a pres le Coronnement le Roy, Que quatres Evesques, quatres Contes, & 6 Barons dussent estre pres du Roy, pour le Counseller issint que toutz fois 4 y fuissent. Cest a Savoir, un Evesque, un Conte, & dieux Barons, a Moynex, & que nulle grosse besoigne soit fait sans leur Assent, & que Chescune respondist dez cez fetz pur son temps; le dit Roger nient eyant regard al dit Assent, accrocha a ly Royal Povere, & le Government del Realme sur le Estate. le Roy ousta & fist oustre & mettre Ministres en l’ oustele le Roy & aillours par my le Realme a ce volunte de ceux que fuerunt de son accorde. Et myst Jean Wyardet & autres entour le Roy despier ses faits & ses ditz. Issint que le Roy fuist entyele manere*
“ envy.

“ envyronne de ces Ennemys qil poet riens faire
 “ de sa volunte mes auxi come un Homme de
 “ South altre Garde.

2. “ Par la ou le Piere nostre Seigniour le
 “ Roy feust a Kenilworth par ordeinances des
 “ Pieres de la terre, a dimorer illonques a ses
 “ eses, pur estre Servi come afferreit uni tiele
 “ Seigneur, Le dit Roger par reall povare
 “ a ley accroche, nelessa tant quil l'eust devers
 “ luy a sa volunte. Et ordyna quil fust
 “ fausement traierousement & felcissement
 “ mordre & tue.

3. “ Ensy le dit Roger fist defendre par
 “ brieve le Roy sous le grant Seale que null
 “ venfist al Parlyment de Salusbury, a force
 “ & Armes sour quan qil poet forfere devers
 “ le Roy. Et la vynt le dit Roger & autres
 “ de sa Covygne al force & Armes al dit Par-
 “ lyment contre la dyte defence, par quoy plu-
 “ sours de la terre come le Conte de Lanca-
 “ stre & autres Sachans la manere de sa ve-
 “ nue ne vyndrent point. Et come par la ou
 “ les Prelats estoit Assemblez al dit Parly-
 “ ment, en un Meason pur Counseiller sur les
 “ besoignes le Roy & de Realme, le dit Roger
 “ debrusa les eos de la Measone ovez gentz des
 “ Armez sour les ditez Prelats, & les manasa
 “ sa de vye & de membre sils fuissent si hardys
 “ a dire ove faire riene en contre sa volunte
 “ & ordynances, E en meme le Parlyment fist
 “ tant que le Roy luy fist Conte de la Marche

“ & luy dona plusieurs terres & tenementz
 “ en Disberifon de la Couronne. E puis mena
 “ le dit Roger & ceux de sa Couygne nostre
 “ Seigneur le Roy, Armez sur le conte de
 “ Lancaſtre & autres Pieres de la terre tan-
 “ que a Wincheſter la ove yls eſtoient venan-
 “ cez devers le Roy au dit Parlyment de Sa-
 “ lusbury. Par quoy le dit Conte & les al-
 “ tres piers de la terre per eſchever le peril que
 “ poet avenir, a la Reverence le Roy depar-
 “ tirent & aylerent en vers leur pays dolons
 “ qils ne point ove leur Seigneur Lege parlere
 “ ne Conſeillere come ils deveront.

4. “ Enſy le dit Roger fiſt le Roy Chiva-
 “ cher forciblement ſur le Conte de Lanca-
 “ ſtre & autres Pieres de Realme que eſtoint
 “ ordeinez devoir eſtre pres du Roy par luy
 “ Conſeiller. Et entant les Enchaſſa par force
 “ que le dit Conte & autres Grantz del
 “ Realme que voilerent profit au Roy, ſe
 “ miſtrent a la Grace le Roy, ſauve erous
 “ vye & Membre & qils ne fuſſent Deſherits ne
 “ altrop grant ranſon, Meſils furent my au
 “ trop grant ranſon, que leurs terre vendront
 “ a tou jours. Et les autres fiſt enchaſer de
 “ la terre a Seizer leurs terres contre la
 “ fourme de la grant Chartre & Ley de
 “ terre.

5. “ Enſy par la ove le dit Roger ſavoit
 “ bienne qe le Piere nostre Seigneur le Roy
 “ eſtoit morte enterre, il par altrez de ſa Co-
 “ uygne

“ vygne en desceivance manere, fist entendre
 “ al Edmund Conte de Kent, qil fuist envie,
 “ par quoy le dit Conte fuist moult desirous de
 “ savoir le verite, E fist espier par totez les bo-
 “ nez voiez que savoit, tanke le dit Roger
 “ par reall power aluy accroche fist prendre al
 “ Parlyment de Winchester le dit Conte de
 “ Kent, e procura qil fuist illo neques mys
 “ a la mort.

6. “ Ensy le dit Roger fist le Roy doner
 “ a luy ses enfantz ea ses alies Chastieles, Vil-
 “ les, Maneres & Franchises en Engleterre,
 “ Ireland, & Gales en descresse de sa Co-
 “ ronne.

7. “ Ensy le dit Roger en desceivance ma-
 “ nere fist les Chivalers des Contez, al dit
 “ Parlyment al Roy de chescune ville de En-
 “ gliterre, que respond par quatre, & le pro-
 “ vost en Eyre un Homme de Armes a lour
 “ costages en sa Guerre de Gascoigne par un
 “ An: la quele charge le dit Roger avoit
 “ compasse a tourner ceol avoir en altre profit
 “ pur luy & autres de sa Covygne en destruction
 “ de People.

8. “ Ensy le dit Roger par real povare a
 “ luy accroche fist mander letters suth le grant
 “ Chartre, au plusours grants Chivalers &
 “ autres qe ils venesent al Roy geu part qil
 “ fuist & a lour venue le fist charger qils se ad-
 “ dressent daler en Gascoigne ou qils feissent
 “ fyn oue ranson a sa volonte: Des queus as-

“ cunez fierent fyn grevous & tout le pluis est
 “ venuz en profit le dit Roger.

9. “ Ensy le dit Roger faustment & mali-
 “ ciousment fist le discorde enter le Piere no-
 “ stre Seigneur le Roy & la Rayne sa Com-
 “ paigne & la fist entendre qe si ele out venuz
 “ a luy qil le out tue de cotele, ove altre arme
 “ ove altre manere de mordre & par tieles
 “ cause, & autres sottilettes si fist il tant qe la
 “ Reine ne vynt pas devers son Seignieur al
 “ grant Dishonour du Roy & de tote le Realme
 “ & Damage par cas entemps avenir. Qe Dieu
 “ defende.

10. “ Ensy le dit Roger sy ad pris &
 “ fait prendre divers luy & les autres de sa
 “ Compaigne de Tresor le Roy a sa volunte
 “ sanz nombre en denirs & Juagais en destru-
 “ ction du Roy. Issint qe le Roy nad drien de
 “ payer pur son vivre.

11. “ Ensy le dit Roger sy ad fait prendre
 “ devers luy & devers ses aliez 20 Mille marz
 “ queux sont venuz horz dez scozce pur la
 “ fourme de la pees & rien est venu al profit
 “ du Roy.

12. “ Ensy le dit Roger ces prizes par my
 “ le Realme auxi come Roy & Seignieur de
 “ tutte & entre luy & les autres de sa covygne
 “ merent al double des gentz & chivalez en la
 “ Compaigne le Roy, qe le Roy ne fist en de-
 “ struction del People sans fair payment altre
 “ que a leur volunte.

13. “ Ensy

13. “ Ensy le dit Roger parson real povare
 “ fist le granter a la montance 200 Chivelerz
 “ a ceoux d’Ireland qe avoint tuez les grantz,
 “ & altres de la terre qe furent de la foye le
 “ Roy encelles parties. Par la ove le Roy de
 “ voit plus test par reson, avoir vengee
 “ lour mort qe pardonnez contre fourme de
 “ Parlyment.

14. “ Ensi le dit Roger compassa devoir
 “ destrut les Noryes le Roy & les Secrettez le
 “ Roy de quex il sy plus affya, & susmyt al
 “ Roy en Presence la Reigne, sa miere & des
 “ Eveskus de Nicole & de Salusberrie, &
 “ altris de Conseil de Roy qe les avant ditz
 “ Secrettez le Roy, luy exciterent destre la
 “ Covygne des Enemyz par de la en destruccon
 “ de sa miere & de lavant dit Roger. La
 “ quele chose il afferma tant sour le Roy qe la
 “ parole le Roy ne poet estre creu. Et cela
 “ venderdi la nute gils estoit prizez a la myt
 “ nuyt suant donke pur les Causes suscriptes
 “ & molt dezaltres chousez qe ne sont ore adyre
 “ si fist le dit Roy prendre en la manere par
 “ eide & avisement des privez & nurriez.

Imprimis. “ Whereas at the Parliament
 “ held at London, immediately after the
 “ King’s Coronation, it was ordained, that
 “ four Bishops, four Earls, and six Barons,
 “ should be always near the King for his
 “ Council; that is to say, one Bishop, one Earl,
 “ and two Barons at the least, at once; and

“ that no Affair of Consequence should be
 “ transacted without their Consent ; and
 “ that each of them shou’d be responsible
 “ for what was done during the Time of
 “ their Attendance : The said *Roger* not ha-
 “ ving regard to the said Assent, accroach’d
 “ to himself Royal Power, and the Govern-
 “ ment of the Realm, *above the Estate of the*
 “ *King* ; and put out the Ministers of the
 “ Household of the King, and others in the
 “ Realm, and he put in others at his own
 “ Pleasure, such as were of his own Party.
 “ And he plac’d *John Wyard*, and others a-
 “ bout the King, to espy his Actions and
 “ Words, so that the King was environ’d
 “ in such manner by his Enemies, that he
 “ could do nothing of himself, but was
 “ like a Man in Ward.

2. “ Also, whereas the King’s Father
 “ was at *Kenilworth* by Ordinance of the
 “ Peers of the Land, to live there at his
 “ Ease, and to be serv’d in a Manner fitting
 “ for such a Lord, the said *Roger* by Ac-
 “ croachment of Royal Power, did not rest
 “ till he had him as it were a Prisoner at
 “ will ; and then he order’d him to be
 “ carry’d to the Castle of *Berkeley*, where,
 “ by him, or by those whom he plac’d a-
 “ bout him, he was falsly, traiterously, and
 “ feloniously murther’d and kill’d.

3. “ Al-

3. “ Also the said *Roger* forbad by the
 “ King’s Writ, under the Great Seal, that
 “ none should come to the Parliament at
 “ *Salisbury* with Force and Arms, upon pain
 “ of forfeiting whatsoever they cou’d forfeit
 “ to the King; yet the said *Roger*, and o-
 “ thers of his Party, came with Force and
 “ Arms to the said Parliament, contrary to
 “ the said Prohibition; for which Reason,
 “ several *Peers* of the Land, as the Earl of
 “ *Lancaster*, and others, understanding the
 “ manner of his coming, did not come.
 “ And whereas at the said Parliament, the
 “ Prelates were assembled *in one House* to
 “ consult of the Affairs of the King, and of
 “ the Realm, the said *Roger* with armed
 “ Men, broke open the Doors of the said
 “ House upon the Prelates, and threatned
 “ them of Life and Member, if they were
 “ so hardy as to do any Thing against his
 “ Will and Ordinance. And in the said
 “ Parliament, the said *Roger* caus’d the
 “ King to create him Earl of *March*, and
 “ to grant him several Lands and Tene-
 “ ments, to the Disherison of the Crown.
 “ And afterwards the said *Roger*, and those
 “ of his Party, led the King armed as far as
 “ *Winchester*, against the Earl of *Lancaster*,
 “ and other *Peers* of the Land, who were
 “ come thither in their Way to meet the
 “ King at his Parliament at *Salisbury*; for

“ which Reason the said Earl, and the o-
 “ ther Peers of the Land, to avoid the
 “ Mischief that might have happened,
 “ out of Respect to the King, departed, and
 “ went to their own Countries, grieving
 “ that they might not speak with, nor ad-
 “ vise their Leige Lord as they ought.

4. “ Also the said *Roger* caused the King
 “ to March forcibly against the Earl of
 “ *Lancaster*, and the other Peers of the
 “ Land who were appointed to be with
 “ the King to advise him. And he pro-
 “ secuted them with such Force, that the
 “ said Earl, and the other Great Men of
 “ the Land, who wished well to the King,
 “ submitted to the King’s Mercy, saving
 “ to themselves Life and Member; and
 “ that they might not be disinherited, nor
 “ have too great a Fine set upon them; yet
 “ he caused them to be fin’d so grie-
 “ vously, that if their Land was sold right
 “ out, it wou’d but pay it. And the o-
 “ thers he caus’d to be driven out of the
 “ Nation, and their Lands to be seiz’d,
 “ *against the Form of the Great Charter, and*
 “ *the Law of the Land.*

5. “ Whereas the said *Roger* knew well,
 “ that the King’s Father was dead and bu-
 “ ried, he by others of his Party, in de-
 “ ceitful manner, informed the Earl of *Kent*
 “ that he was alive: Wherefore the said
 “ Earl

“ Earl being desirous to know whether it
 “ was so or not, used all the good Ways he
 “ could to discover the Truth : Infomuch
 “ that the said *Roger*, by his usurped Royal
 “ Power, caused him to be apprehended
 “ at the Parliament held at *Winchester*, and
 “ so pursu’d him, that in that Parliament
 “ he was put to Death.

“ 6. Also the said *Roger* caus’d the King
 “ to give to him and his Children, and his
 “ Confederates, Castles, Towns, Manors
 “ and Franchises, in *England*, *Ireland*, and
 “ *Wales*, to the Decrease of the Crown.

7. “ Also the said *Roger*, in deceitful man-
 “ ner, made the Knights of Shires, at the said
 “ Parliament, grant to the King one Man
 “ at Arms of every Town in *England*, that
 “ answered in Eyre, by four, and the Pro-
 “ vost, at their Cost, for a Year, in his
 “ Wars in *Gascoigne* : Which Charge he
 “ contriv’d to turn it to the Profit of him-
 “ self and Party, in Destruction of the
 “ People.

“ 8. Also the said *Roger*, by his said ac-
 “ croached Royal Power, caused Summons
 “ to be sent to many Great Knights and
 “ others, under the Great Seal, that they
 “ shou’d come to the King where-ever he
 “ was, and when they came, he caus’d
 “ them to be charg’d to prepare themselves
 “ to go into *Gascoigne*, or to fine at his
 “ Plea-

“ Pleasure : Which Fines were for the Benefit of him and his Party.

“ 9. Also the said *Roger* falsely and maliciously caus'd Discord between the Father of our Lord the King, and the Queen his Wife, and possessed her, that if she went to him, she shou'd be kill'd with a Dagger, or otherwise murthered : And by this means, and his other Subtleties, he so order'd it, that she would not come near her Lord, to the great Dishonour of the King, and in time to come perhaps to the Mischiefe of the whole Realm. Which God forbid.

“ 10. Also the said *Roger* had caused to be taken for himself and Party, as much of the King's Treasure as he pleas'd, without Tale, in Money and Jewels, to the Destruction of the King ; insomuch that the King had not wherewithal to pay for his Victuals.

“ 11. Also the said *Roger* caused to be taken for himself and Confederates, the 20000 Marks, which came out of *Scotland* for the Articles of Peace, without any Part of it coming to the Profit of the King.

“ 12. Also the said *Roger* received the King's Dufies and Purveyances throughout the Kingdom, as if he had been King ; and he and his Party had with them
“ double

“ double the Company of Men and Horſe
 “ that were with the King, to the De-
 “ ſtruction of the People, they not paying
 “ for their Quarters more than they
 “ pleas’d.

“ 13. Alſo the ſaid *Roger*, by his ſaid
 “ uſurped Royal Power cauſed the King
 “ to grant to the Mounting 200 *Irish*, of
 “ thoſe who kill’d the Great Men and o-
 “ thers, who were in the King’s Faith in
 “ thoſe Parts: Whereas the King ought
 “ immediately to have reveng’d their Death,
 “ rather than have pardoned them contrary
 “ to the Statute and Aſſent of Parliament.

“ 14. Alſo the ſaid *Roger* contriv’d to
 “ have deſtroy’d the King’s ſecret Friends,
 “ in whom he had the moſt Confidence.
 “ And he ſurmis’d to the King, in the Pre-
 “ ſence of the Queen his Mother, the Bi-
 “ ſhops of *Lincoln* and *Salisbury*, and others
 “ of the Council, that his ſaid ſecret Friends
 “ had excited him to combine with his Ene-
 “ mies beyond Sea, to the Deſtruction of
 “ the Queen his Mother, and him the ſaid
 “ *Roger*: And this he affirm’d ſo impudent-
 “ ly upon the King, that the King cou’d
 “ not be believ’d againſt what he had ſaid.
 “ And for theſe things, and many others
 “ not as yet fit to be declared, was he ap-
 “ prehended, &c.

It is visible, that the greatest Point of Treason against *Mortimer*, was his being accessory to the Murther of the *King's Father*, *Edw. II.* after he was deprived of his Royal Dignity, and thereby reduced to the Condition of a private Man, and in *Fact a Subject to his Son*; which is not now, I believe, *suspected to be Treason* within the Statute. However it must be acknowledged, that this Judgment against *Mortimer* was afterwards revers'd. In the Parliament 28 *Ed. 3. n. 7*, to 14. *Roger Mortimer*, Cousin and Heir to this executed *Roger*, required by Petition, that this Judgment and Attainder pass'd 4 *Ed. 3. n. 1.* might be reviewed and examined, and for manifest Errors therein reversed. The only Error assigned upon this Petition, was, for that the Judgment was defective and erroneous, in that the said Earl was put to death and disinherited *sans nulle accusament, & sans este mesne au Jugement, au en respons*; that is, in short, without the Formalities of a Trial. For this Cause only, and not for any Error assigned as to the Substance of the Charge, was the Judgment reversed and set aside. So that it rather affirms than otherwise all the Points alledged in the Charge to be treasonable; for certainly it would have been more honourable for young *Roger* to have prov'd his

Uncle

Uncle not a Traytor, than to restore himself in Blood by an Error in point of Form.

In the same Parliament, 4 Ed. 3. the King charg'd the Earls and other Peers to give Judgment against *Simon de Beresford, Thomas Gurney, &c.* for being aiding and assisting to the said *Roger Mortimer* in his Treasons and Felonies, &c. which *they scrupled to do, the said Simon not being their Peer*: But at last, it appearing manifestly that they were concern'd in the said Treasons and Murther of Ed. 2. (*Et Destruction du sang Royal*) they as *Peers and Judges of Parliament*, did give Judgment of Death against them.

The Lord *Berkley*, in whose Castle E. 2. was murthered, was arraigned for the same Crime, who, for what Reason I cannot imagine, *wav'd his Peerage*, and put himself on the Trial of his Country, and was actually tryed for Treason before the King by a *Jury of Knights* in full Parliament, and by them acquitted. This Case being very remarkable, I think the whole Record deserves to be printed.

“ *Thomas de Berkele Miles venit coram Domino Rege in pleno Parlamento suo predicto,*
 “ *& allocutus est hoc: Quod cum Dominus*
 “ *Edvardus, nuper Rex Anglia, pater Domini Regis nunc, in custodiam ipsius Thomae*
 “ *&*

“ & ejusdem Johannis Mantravors, nuper ex-
 “ titit collatus, ad salvò custodiend. in castro
 “ ipsius Thomæ apud Berkele in comitatu Gla-
 “ vorum, & in eodem castro, in custodia ip-
 “ sorum Thomæ & Johannis murdratus extitit
 “ & interfectus; qualiter se velit de morte ip-
 “ sius Regis acquietare. Dicit quòd nunquam
 “ fuit consentiens, auxilians, seu procurans
 “ ad mortem suam, nec unquam scivit de morte
 “ suâ, usquam in præsentì Parlamento isto;
 “ & de hoc paratus est acquietare se, prout
 “ curia Regis consideraverit. Et super hoc
 “ quæsitus est ab eo, Ex quo? ipse est Domi-
 “ nus castri prædicti; & idem Dominus Rex
 “ in custodiam ipsorum Thomæ & Johannis
 “ extitit liberatus ad salvò custod. & ipsi
 “ custodiam ipsius Regis receperunt & accep-
 “ taverunt; qualiter se excusare possit, quin
 “ de morte ipsius Regis respondere debeat?
 “ Et prædictus Thomas dicit, quòd verum est,
 “ quòd ipse sit Dominus castri prædicti, &
 “ quòd ipse simul cum Johanne Mantravors
 “ custodiam ipsius Regis recepit, ad salvò
 “ custod. ut prædictum est; sed dicit, quòd eo
 “ tempore quo dicitur ipsum Dominum Regem
 “ esse murdratum & interfectum, fuit ipse
 “ taliter tantâ infirmitate apud Bradelye extra
 “ castrum prædictum detentus, quòd ei curre-
 “ bat memoria. Et super hoc dictum est ei,
 “ quòd ex quo cognovit quòd ipse simul cum
 “ dicto Johanne custodiam ipsius Domini Regis
 “ obtinuit,

“ obtinuit, ut prædictum est, & ipse custodem
 “ & ministrum sub se posuit, ad custodiam de
 “ eo faciendam, si per aliquam infirmitatem
 “ excusari possit, quin respondere debet in hac
 “ parte? Et prædictus Thomas dicit, quod
 “ ipse posuit sub se tales custodes & ministros
 “ in castro prædicto pro custodiâ faciendâ, à
 “ quibus ipse se confidebat ut de seipso, qui
 “ custodiam ipsius Regis simul cum prædicto
 “ Johanne Mantravers inde habuerunt; unde
 “ dicit quod ipse de morte ipsius Domini Regis,
 “ auxilio, assensu, seu procuratione mortis suæ,
 “ in nullo est inde culpabilis. Et de hoc
 “ de bono & malo ponit se super patriam.
 “ Ideo venerunt inde juratores coram Domino
 “ Rege in Parlamento suo apud Westmonaste-
 “ rium, in Octabis sancti Hilarii proximè
 “ futuris, &c. Ad quam diem venit præ-
 “ dictus Thomas coram Domino Rege in pleno
 “ Parlamento, ac fil. Jurat. sc. Johannes
 “ Darci, &c. omnes milites, qui dic. super
 “ sacramentum suum, quod prædictus Thomas
 “ de Berkele in nullo est culpabilis, prædicti
 “ Domini Edvardi Regis, patris Domini Re-
 “ gis nunc, nec de assensu, auxilio, seu procu-
 “ ratione mortis ejusdem: Et dicunt quod tem-
 “ pore mortis ejusdem Dom. Edvardi Regis Pa-
 “ tris Dom. Regis, fuit ipse tali infirmitate gra-
 “ vatus, apud Bradeley extra castrum suum præ-
 “ dictum, quod de vitâ ipsâ desperabat. Ideo
 “ idem Thomas inde quiet. Et Jurat. quæsit.
 “ si

“ *si idem Thomas unquam subtraxit se occasione*
 “ *prædictâ ? Dic. quòd non. Et quia idem*
 “ *Thomas posuit custodem & ministrum sub se,*
 “ *sc. Thomam de Gurney & Willielmum de*
 “ *Ocle, ad custodiam de ipso Domino Rege fa-*
 “ *ciendam, per quod idem Dominus Rex exti-*
 “ *tit murdratus & interfectus, dat. est ei dies*
 “ *coram Domino Rege nunc in proximo Par-*
 “ *liamento suo, ad audiendum iudicium suum,*
 “ *&c. Et prædictus Thomas de Berkele inte-*
 “ *rim committitur Radulpho de Nevill, Ma-*
 “ *reschallo Hospitii Domini Regis, &c.*

In this Parliament they did not only think it Treason to kill the *King's Father*, but their Notion of it was so large, that Judgment of Treason was given against Sir *John Mantravers*, *Bogo de Bayons*, and *John de Veroil*, for being guilty of the Murder of *Edmund Earl of Kent*, who was no more than Uncle to the King.

Sir *William Thorpe*, one of the *Justices* of the *King's Bench*, and *Justice of Assize* in *Com. Lincoln.* 23 *Ed.* 3. against his Oath, took several Bribes from several People to stay an Exigent upon an Indictment for Felony, that shou'd have issued against them : For which he was try'd and convicted before the Earls of *Arundel*, *Warwick*, &c. to whom the King by a special Commission had referred the Examination of the Business,

Business. “ *Ideo consideratum est per dictos*
 “ *Iustitios assignatos ad iudicandum se-*
 “ *cundum voluntatem Regis, & secundum*
 “ *Regale posse suum : Quod quia prædictus*
 “ *Willielmus Thorpe, qui sacramentum Do-*
 “ *mini Regis, quod erga populum suum*
 “ *habuit custodiendum, fregit malitiosè,*
 “ *falsè & rebelliter, in quantum in ipso fuit,*
 “ *& ex causis supra dictis ipsum Willielmum*
 “ *expresè cognitis ; Ideo suspendatur, &*
 “ *quod omnia terræ & tenementa, bona &*
 “ *catalla sua remaneant forisfacta.*

The King by Writ stay'd the Execution, and in the Parliament 25 Ed. 3. n. 10. the Record of this Judgment was brought into the House of Lords, to have their Advice and Opinion concerning it, whether it was legal or not ; and all the Lords, *nemine contradicente*, affirmed the Judgment to be good and legal. And it was thereupon agreed by *all the Lords*, that whenever the like Case shou'd happen, the King employing such of the Nobility as he should think proper, might do therein according to his own Pleasure : Under this Proviso however, that the said Judgment shou'd not be drawn into Precedent against any other Officers who shou'd break their Oaths, *but only against the Judges, who have the Laws of England in their Custody :*
 “ *Contra eos tantum, qui prædictum sacra-*
 F “ *mentum*

“ *mentum fecerunt* (Justitiariorum) & *fre-*
 “ *gerunt, & habent leges Angliæ regales ad*
 “ *custodiendum.*

The Precedents which have been hitherto cited are altogether Parliamentary, and I think it may be fairly concluded from them, that any Crime which had the Publick, as such, for its Object, and which cou'd properly be stiled, *an horrible Offence against the Safety of either King or Kingdom*, was constantly in Parliament adjudged to be *Treason*.

This therefore being the true Notion of High *Treason* at the *Common Law*; the next thing to be considered is, what Alteration or Change it may have undergone by reason of the Statute 25 *Ed. 3.* or any other. To which end I here transcribe it.

Item, “ Whereas divers Opinions have
 “ been before this Time, in what Case
 “ *Treason* shall be said, and in what not:
 “ The King, at the request of the Lords,
 “ and of the Commons, hath made a Declaration in manner as hereafter followeth; (that is to say) when a Man doth compass or imagine the Death of our Lord the King, or of our Lady his Queen, or of their eldest Son and Heir; or if a Man doth violate the King's Companion, or the King's eldest Daughter unmarried,
 “ or

“ or the Wife of the King’s eldest Son and
 “ Heir, or if a Man doth levy War against
 “ our Lord the King in his Realm, or be
 “ adherent to the King’s Enemies in his
 “ Realm, giving to them Aid and Comfort
 “ in his Realm or elsewhere, and thereof
 “ be probably attainted of open Deed by
 “ the People of their Condition. And if a
 “ Man counterfeit the King’s Great or Pri-
 “ vy Seal, or his Money. And if a Man
 “ bring false Money into this Realm, coun-
 “ terfeit to the Money of *England*, as the
 “ Money called *Lushburgh*, or other like to
 “ the said Money of *England*, knowing
 “ the Money to be false, to merchandize or
 “ make Payment in Deceit of our said Lord
 “ the King, and of his People. And if a
 “ Man slay the Chancellor, Treasurer, or
 “ the King’s Justices of the one Bench or the
 “ other; Justices in Eyre or Justices of Assize,
 “ and all other Justices assigned to hear and
 “ determine, being in their Places doing
 “ their Offices: And it is to be understood,
 “ that in the Cases above rehearsed, that
 “ ought to be judged Treason which ex-
 “ tends to our Lord the King and his Royal
 “ Majesty; and of such Treason the For-
 “ feiture of the Escheats pertaineth to our
 “ Lord, as well of the Lands and Tene-
 “ ments holden of others as of himself. And
 “ because that *many other like Cases of Trea-*
son

“ *son* may happen in Time to come, which
 “ a Man cannot think nor declare at this
 “ present Time, it is accorded, That if a-
 “ ny other Case, supposed Treason, which
 “ is not above specify’d, doth happen be-
 “ fore any Justices, the Justices shall tarry
 “ without any going to Judgment of the
 “ Treason, till the Cause be shewed *before*
 “ *the King and his Parliament*, whether it
 “ ought to be judged Treason or other Fe-
 “ lony.

This Act of Parliament was intended to be a strong Bulwark for the Liberties of the People, against any Oppressions they might be liable to from the Crown. But now by a strange kind of *Revolution*, it is made Use of by some to protect Ministers against the just Resentment and Prosecution of Parliament : *And an Act of Parliament is pleaded, in Barr to the Power of Parliaments.* But if we examine what the true Reason of making this Statute was, I believe it will be found to be no Ways favourable to their Cause. It has been already hinted, that before this Statute was made, the Adjudication of those particular Actions which should be punished as Treasonable, was altogether in the Cognizance of the ordinary Courts of Justice, and for Want of fixed Rules, almost discretionary in the Judges, and they
 being

being absolutely in the Power of the Crown, the Preservation of their Places inspired them with a wonderful Zeal to punish all such Crimes as Treason, which particularly affected the Prince, *as distinct from the Publick*. And then there was a very weighty Reason to induce the Prince, to desire the Doctrine of Treason to be as extensive, and also as ambiguous as possible; a considerable Revenue arose from it, for in High Treason, at the *Common Law*, all the Lands, &c. of the Criminal, from whatsoever Lord they were holden, were forfeited to the Crown; when as in other Cases the Lands, &c. escheated to the several Lords from whom they were held: And it is not improbable, but that the Judges, to improve their Interest at Court, did very often adjudge Cases to be Treason (which they ought not in strict Justice to have done) in order to secure a considerable Forfeiture to the Crown, *satisfying their Consciences* with this Consideration, that if a Man must be hang'd, it matter'd not much, whether it was for Treason or Felony; by which means the inferior Lords were dextrously cheated of the Benefit of their Escheats. This (as it really was a great Grievance) was complain'd of in Parliament about four Year before this Act was made. For *Rot. Parl. 21 Ed. 3.* the Commons petition, *That whereas some Justices had lately*

adjudged Matters before them, to be *Treason and Accroachment of Royal Power*, whereby the Lords lost the Benefit of the Forfeiture of their Escheats, they desire that those Matters might be settled in certain.

The Answer to their Petition was not such as they expected, but they were forced to stay till 25^o Ed. 3. This gives one a tolerable Idea of what our Ancestors intended by this famous Statute of Treasons. For certainly nothing can so well direct us to the Intention of Legislators, as the perfect Knowledge of the Mischief they intended to remedy and prevent. But let us quote a few Instances of those Treasons which were then look'd upon and esteem'd to be so great a Grievance. *Tr. 21 Ed. 3 pl. 24.* a Person was condemned and executed for Treason, for killing a Man who was riding to the King, to serve him in his Wars. *L. 1. Ass. 22 Ed. 3. pl. 49.* It was adjudged High Treason to kill a Man who was sent on an Errand from the King. But *Britton* goes much farther, for *p. 43.* He in the Person of the King, says, that it is, *Haute Trebison — pur giser avec les Norrices de nos Enfants.* What Implications and Innuendoes must there be to make these Facts Treasons? How hard and unjust would it now be thought, was any Man to be hang'd, &c. only for lying *with the Court-Nurse?*

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But these are not the only Reasons to induce one to think, that the Parliament in the making of this Statute, only intended to regulate the Jurisdiction of the inferior Courts of Justice. It may be shown from a much higher Authority, that what they did was wholly founded upon, and levelled against these Corruptions and Irregularities of the Judges. *The Petition of the Commons* upon which this Act of Parliament was drawn, sufficiently demonstrates that only to have been the Intent and Meaning of it. It was in these Terms, 25 Ed. 3. Rot. Parl. N. 171. “ *Item, Come les Justices nostre Seigneur le Roy assignes en diverses Countees ajuggeent les Gentz que sont empechez devant eux come Traytors pur diversez causes, desconnues a la Comune estre Treason, Que please a nostre Seigneur le Roy per son Conseil, & per les Grants & Sages de la terre, declarer les Points de Treson en cest present Parliament. Item, Whereas the Justices of our Lord the King, assigned in diverse Counties, do adjudge the People who are brought before them as Traytors, for divers Causes unknown to the Commons, to be Treason. May it please our Lord the King, by the Advice of his Council, and the Great and Wise Men of the Land, to declare the Points of*

“Treason, in this present Parliament”. But to make the Force of this Observation appear the stronger, I shall state the Difference of the Method which was formerly used in the making Acts of Parliament, from that which is now in Use. Antiently, a Bill in the Nature of a Petition was delivered to the Commons, and by them sent up to the Lords, and there it was immediately entred upon the Lords Rolls, where the Royal Assent was entred also; and upon this, as a Ground Work, the Judges used at the End of the Parliament, to draw up the Substance of the Petition and Answer into the Form of a Statute, which was afterwards entred upon the Rolls, called the Statute-Rolls, which were distinct Rolls from those called the Lords Rolls, or the Parliament-Rolls. Upon the Statute-Rolls neither the Bill nor Petition from the Commons, nor Answer from the Lords, nor the Royal Assent, were entred. But only the Statute as it was modell’d and drawn up by the Judges. This was the Method till about *Henry* the 5th’s Time, when it was desired that the Acts of Parliament might be drawn by the Judges before the rising of the Parliament; which was occasioned by Reason of a Complaint then made, that the Statutes were not fairly drawn after the Parliament was dissolved or prorogued. In *Henry* the 6th’s Time

Time this Method was alter'd, and Bills in the Form of an Act of Parliament were brought into the House. Upon which Bill, if the Commons approved it, was written, *Soit baile al Seigneurs*; when it came into the House of Lords they wrote upon it, *Soit baile al Roy*: Upon which was afterwards entred the King's Assent, in these Terms, *le Roy le voelt*. And this is the Method used at this Day, *Vid. Hales, Prynne, Hakewell*, Mod. Ten. Parl.

From this it is manifest, how necessary it is to peruse *the Petition* upon which a Statute is drawn, in order to understand an old Act of Parliament. By what has been said, I hope that it appears plainly, what the Mischief was against which this Act of Parliament was levell'd. And I think it can never be supposed, that the Parliament intended to confine all Treason to those particular Species which are mention'd in this Act; since it is utterly impossible to be done, for *an Act of Parliament* to determine and specify all *Cases of Treason* in the Nature of Things, seems to be as absurd as it wou'd be to specify *all the Actions on the Case*. I say this the more confidently, because it may be proved from the Act it self, that the makers of it thought so, for the very Reason alledged for the Clause of Reservation, is, because "that many other like Cases might
" hap-

“ happen in Time to come, which a Man
 “ cannot think nor declare at this Time.

” It may justly therefore be concluded, that
 ” every Thing is even now *Treason at the*
 ” *Common Law*, which was so before this
 ” Statute was made: And all the difference
 ” created by it, relates wholly to the Juris-
 ” diction of those *Courts* which are to *take*
 ” *Cognizance* of Crimes of this Nature. It is
 ” certain that any inferior Court of Justice can-
 ” not now adjudge any Thing to be *Treason*,
 ” which is not such in the plain Sense and Mean-
 ” ing of this, or some other subsequent Statute.
 ” But it seems to be as certain, that if any
 ” other Case does happen, which is supposed
 ” to be *Treason*, and is not specified in this
 ” Statute, *the Parliament* have reserved to
 ” themselves *a Power* of declaring it to be
 ” *Treason*; and when any such Declaration is
 ” made, the Criminal suffers as legally for a
 ” Traytor within this Statute, as if he had
 ” been condemned in *Westminster-Hall* upon
 ” any Point of *Treason* plainly specified in
 ” the Act.

” *This therefore* is the State of the Case upon
 ” this Statute, that it was not the Intention of
 ” the Parliament to annihilate all such Treas-
 ” ons which were not specified, but only to
 ” regulate and abridge that almost discretio-
 ” nary Power of adjudging *Treason* which
 ” was in the ordinary Judges. Those parti-
 cular

cular Treasons which are certain and indisputable, as, *e. g.* Conspiring the King's Death, levying War against him in his Realm, or elsewhere, counterfeiting Money, &c. are left to the ordinary Courts of Justice. But those other Cases which are not so clear, but depend upon *Constructions, and necessary Inferences*, they thought dangerous to trust with any Power inferior to that of the *Parliament*.

The next Thing to be considered, is an Objection which is frequently urg'd (*viz.*) That this Clause of Reservation is repealed.

Mr. *Lane* in his Argument for my Lord *Strafford*, asserts roundly, that this Clause was repealed by 1 *H. 4. cap. 10.* and by 1 *M. cap. 1.* and my Lord *Clarendon* gives his *probatum est* to this Opinion, p. 177. Vol. 1. in Fol. And tells us, "That Mr. Lane averr'd this with such Confidence as a Man uses who believes himself to be in the right."

This amounts, almost, to the disputing a Matter of Fact; and in Answer to it, I shall particularly consider the Two Statutes which are so much insisted on. The Stat. 1 *H. 4. cap. 10.* is in these Words, "Whereas in the Parliament held 21 *R. 2.* divers Pains of Treason were ordained, inso- much that no Man knew how he ought
to

“ to behave himself, to do, speak, or say,
 “ for fear of such Pains. It is accorded,
 “ that in no Time to come any Treason be
 “ adjudged *otherwise*, than as it was or-
 “ dained by the Statute 25 Ed. 3.

Let any Man read this *Statute*, and then say if there is any Expression in it that looks like a Repeal of any part of 25 E. 3. Or if it be not as plain a *Restoration and Inforcement of it in toto* as can be expressed in Words. And surely it cannot be pretended, that a Man condemn'd for a Treason declar'd by Parliament, in Vertue of that Clause of Reservation, is adjudged *otherwise* than was ordained by the Statute 25 Ed. 3. This seems to be the plain Sense and Meaning of this Statute; and it is manifest from the very Terms of it, that the principal Mischief the Makers had in view, was to relieve the Subject against what had pass'd in the *Parliament 21 R. 2.*

But it may be objected, to what end was this Statute 1 H. 4. made, if it does not take away those Common Law Treasons which remain'd after the Statute of 25 Ed. 3. Why, *First*, It repeals all such Treasons as had been made by any *Statute* since 25 Ed. 3. And, *Secondly*, It takes away all the *Declaratory Treasons in Parliament* after 25 Ed. 3. which was a very

con-

considerable Effect of it, since those Declarations had been frequently made use of to oppress the Subject: For whenever any Declaration of Treason was made in Parliament, the Inferiour Courts construed it to be *Subsidiary to the 25 Ed. 3.* and took upon them to act therein in such manner, that *toties quoties*, the like Case happened before them, they adjudged it to be Treason. Against this Grievance was the Subject relieved by this Statute. And by the way it may be observed, that the true Reason for the inserting a Clause into the Act of Attainder of the Earl of *Strafford*, *sc.* (That it should not be drawn into Precedent) was in order to prevent a Grievance of this Nature, as appears plainly from the very Words of the Clause. *Sc.* “ Provided that no Judge or Judges, Justice
 “ or Justices whatsoever, shall adjudge,
 “ or interpret any Act or Thing to be
 “ Treason; nor hear or determine any
 “ Treason in any other manner than he
 “ or they should, or ought to have done
 “ before the making of this Act, and as if
 “ this Act had never been made.

2. *The Statute i Mariae, cap. 1.* hath two Clauses in it which are to be considered. By the *First*, It is Enacted, “ That from
 “ thenceforth none Act, Deed, or Offence,
 “ being by Act of Parliament, or Statute,
 “ made

“ *made Treason, Petit Treason, &c. shall*
 “ *be taken, had, deemed, or adjudged to be*
 “ *High Treason, Petit Treason, &c. but*
 “ *only such as be declared to be High Treason,*
 “ *Petit Treason, &c. in or by the Act of Par-*
 “ *liament made 25 Ed. 3.*

These are the Words; and I shall not
 wast Time in making particular Observati-
 ons upon them, for I think it as clear as
 Words can make it, that this Clause extends
 only to the Repeal of *such Treasons* as had
been made by Act of Parliament; so that
 as for any Thing contained in this Clause,
 the *Common Law Treasons are altogether*
untouch'd, and stand upon the same footing
 as if this Act of Parliament had never been
 made.

The second Clause is in these Terms.
 Sc. “ Nor that any Pains of Death, Pe-
 “ nalty, or Forfeiture in any wise en-
 “ sue, or be to any Offender or Offen-
 “ ders, for the doing or committing any
 “ High Treason, Petit Treason, &c. o-
 “ ther than such as be in the Statute
 “ made 25 Ed. 3. ordained and provi-
 “ ded.

I dare refer this Case to every Rea-
 der, whether there be any Thing in
 these Words like a Repeal of any part
 of the Statute 25 Ed. 3. for let it *intend*
only the Punishment of Treason, or both
 Treas-

Treason and Punishment; yet all is referr'd to the 25 *Ed. 3.* and it is plainly no more than a *Re-establishment in toto of that Statute.*

So that in Effect this Statute is the same with that 1 *H. 4.* and its Operation is nothing else but to repeal all *Statutory or Declaratory Treasons*, and Punishments made subsequent to the Statute 25 *Ed. 3.*

But farther; is it possible to conceive, that my Lord Chief Justice *Coke*, who must certainly be allowed to know whether a Statute be repeal'd, or not, shou'd in his *Commentary* upon this very Statute 25 *Ed. 3.* include this Clause of Reservation as a subsisting part of the Statute, was it not still in Force? He even particularly tells us, what is a *Declaration of Treason* within this Statute, and what is not (*viz*) that it must be done by the whole *Parliament, King, Lords, and Commons.* And he adds, in order to enforce his Opinion, that the Declaration and Judgment of the Lords against Sir *Thomas Talbot*, for conspiring the Death of the *Dukes of Lancaster and Gloucester, the King's Uncles*, was illegal and void, for want of the *Concurrence of the Commons*, without which it cou'd not be said to be a Declaration of Treason by
Par.

Parliament, Rot. Par. 17 R. 2. n. 20. Vid.
 & Cokes 3^d Instit. pa. 22.

In his Opinion therefore the Clause stands unrepeal'd, and if it must be understood (as he thinks it ought) so as to relate to the whole Parliament, King, Lords, and Commons, the Clause is then manifestly, only *affirmatory of that Power* which it is not possible to suppose a *Parliament to be without* ; for surely no Man can pretend to dispute, but that the Parliament must always have a Right to inflict upon any Criminal *even ex post facto* such Punishment as they may think his Crime deserves, ' altho' *this reservatory Clause* had never been inserted into the Act of Parliament.

If this therefore be allowed to be the Case, it seems to be of very little Consequence, whether this Clause be repealed or not ; And I should not have spent so much Time to prove that in Fact it was not, had I not observed that a great Number of People imagined it to be of the utmost Consequence. *For if it is still in Force, it is certain that it can give no additional Right to the Parliament ; and if it is repealed, it can take nothing away.*

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The Insignificancy of the Clause in this Sense of it, has among other Reasons, inclin'd some Persons to think that it does not relate to the whole Parliament, but that the *House of Lords*, with the King's concurring Assent, have (or at least had) a Power to declare what is Treason, and what is not, within this Statute. *The Form of the Petition, and the Answer to it*, to them seems to favour that Opinion, (*viz.*) ' That ' the Right of Declaring and Judging what ' is High-Treason in Parliament, did originally belong to the King, with the Concurrence of the House of Lords, exclusive ' of the House of Commons, at whose Request this Declaration of the Articles of ' Treason was made. For, say they, the Petition did not contain particularly what Points shou'd be declared to be Treason, but was only in general Terms, That the Points of Treason might be settled in certain. *The Declaration* of Treason in particular Cases, seems also to have something in it more of the *Judicial* than the *Legislative Capacity*; and they cannot see any Reason why the Word (*Parliament*) used in the Clause, shou'd create so vast a Difference; all the Proceedings in the House of Lords being stiled *Placita coram Rege in Parlamento*. And yet no one ever pretended to infer from thence, a Necessity of the Concurrence of

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the *House of Commons* in their *Judicial Acts*.

In Fact, the *House of Lords* have in particular Cases, with the Consent of the King, adjudged several Persons to die as Traitors, for *Crimes* which were not *Treason* within the Statute 25 *Ed.* 3. And notwithstanding what my Lord Chief Justice Coke says, 4 *Instit.* Pag. 23. I do not believe it was ever assigned in Parliament as Error, that the *House of Commons* were not concurrent to the Judgment: The Case which the Chief Justice refers to, to justify this Assertion, is that of *Thomas Montague*, Earl of *Sarum*, 2. *H.* 5. *Rot. Parl.* N. 13, 14. who Petitioned in Parliament to have a Judgment reversed that was given against his Father, 2. *H.* 4. N^o 30, 31. But he did not in his Petition assign any such Error as is pretended. And if he had, I cannot see how it could support what is concluded from it, but rather directly the contrary, since that Petition was rejected, and consequently all the Errors assigned in it were disallowed.

I know very well that the concurrent Jurisdiction (in some Cases) of the Commons in Points of Judicature, is a Favourite Opinion, *Et non nostrum est tantas componere lites*. However, it is wonderful to me, that the Chief-Justice shou'd quote a Record by way of Proof, which was nothing to the Purpose,
and

and omit another of a much antienter Date, which to me seems to be almost in Point. *King Ed. 3. Anno 1^o Regni sui*, wrote a Letter to the Pope, giving an Account of the Death of *Edmund* Earl of *Kent*, wherein after having made a Relation of the several heinous Crimes which were objected to him, he uses these Words, (*viz.*) “ *Nos igitur*
 “ *tanta facinora, ex relatione fidei ipsorum*
 “ *Comitum Baronum & magnatum Cognos-*
 “ *centes eisdem Comitibus Baronibus Magnati-*
 “ *bus & aliis de Communitate Regni injunximus*
 “ *ut Super hiis discernent, & judicarent,*
 “ *Quod rationi & Justitiæ conveniret habendo*
 “ *præ Oculos Solum Deum. Qui eum Con-*
 “ *corde & Unanimi Sententiâ tanquam reum*
 “ *Criminis læsæ Majestatis morti adjudi-*
 “ *carunt, Cui Sententiæ, &c. Rim. Fæd.*
 “ 4 *Tom. Pag. 424.*

The Precedents of the Lords having exercised this Power (according to Mr. *Prynn*, in his Plea for that Noble House) are numerous; some of which the Reader may himself observe, among those which I shall be obliged to mention, to prove, that ever since this famous Statute has been made, Persons of all Ranks have been executed as Traitors, for Facts which were not specified in it.

A^o 1 R. 1. N^o 38, 39, 40. Rot. Parl.
 The Commons prayed, that all those Cap-

tains who had rendred or lost Towns or Castles through Default, might be put to Answer it in Parliament, and severely punished according to their Deserts, by the Award of the Lords and Barons. . Upon which *William de Weston*, and *John de Gome-
nez*, were brought before the Lords by the Constable of the *Tower*, in whose Custody they were Prisoners, and were Questioned for having Surrendred the Castles of *Outherwyke* and *Ardes* to the *French*, without a sufficient Warrant. There was nothing of Corruption or Treachery prov'd against them, but what they did, seem'd to proceed entirely from Cowardice, (which I suppose no-body imagines to be Treason within the Statute) yet for an Example to other Commanders, they were by the Lords, both adjudged to die as Traitors.

20 R. 2. N. 15, 16. 23. R. P. Sir *Thomas Haxey*, Clerk, was by the King and Lords in Parliament, adjudged to die as a Traitor, and to forfeit all his Lands, Goods, Chattels, &c. for exhibiting to the House of Commons a Scandalous Bill against the King and his Court, for moderating the *outragious Expences caused by Bishops and Ladies*, &c. Indeed 1 H. 4. upon the Petition of the said *Haxey*, supported by a Petition from the House of Commons in his Favour, that Judgment against him was reversed, by the Advice

vice and Consent of the Lords Spiritual and Temporal.

22 R. 2. N. 28. *The Duke of Hereford*, after Judgment was given against him at *Conventry*, had procured by Letters Patents from the King, that he might, during his Absence, by his Attorneys, Sue and have Liveries of any Lands descended to him, and his Homage respited; which Letters Patents were revoked in Parliament, as contrary to Law. And *Henry Bowet*, Clerk, for being of Counsel to this Device made by the *Duke of Hereford*, was by the Lords adjudged to die, and forfeit as a Traitor. It would be too long to Transcribe all the Presidents of the Lords taking upon themselves singly to adjudge Persons to die as Traitors, for Facts which were not Treason, within the Statute of 25 Ed. 3. It is visible from these recited Precedents, that the Lords did take upon them to pronounce Judgments of this Nature. It matters not much, whether the Lords acted *eo nomine*, as having a declaratory Power of what was or was not Treason, when the Criminals were in Fact hang'd as Traitors upon such Judgments. In all these Cases, the Commons were look'd upon as altogether unconcern'd in them; and presently after the before-quoted Judgments had been pronounced, it was declared in full Parliament, *Anno 1^o ipsius H. 4. N. 79.*

“ *That the Commons were only Petitioners,*
 “ *and that all Judgments did appertain to*
 “ *the King, and to the Lords ; and that the*
 “ *Concurrence of the House of Commons*
 “ *was no ways necessary, unless it were to*
 “ *Statutes, Grants, Subsidies, and such like.*

This Declaration is in some measure an Affirmance of the Judicature they had formerly exercised ; and their subsequent Practice was conformable to it ; as in the Case of Sir *John Mortimer* 2^o *H. 6.* who being sent to the *Tower*, upon Suspition of Treason against *H. 5.* broke his Prison, and made his Escape ; for which he was indicted of Treason, and the *Indictment* was return'd into *Parliament*, and there confirmed. Being afterwards apprehended, he was actually Sentenced upon this Indictment, and Executed as a Traytor, without so much as an Arraignment or Tryal.

This Confirmation was Parliamentary, and yet the Bishops are not Parties to it : it begins thus, *de advisamento dict. Dominor. temporalium ac ad requisicon' totius Communitat.*
 &c. So clear a Proof of Guilt was flight esteemed to be in those Times, *R. P. 2 H. 6. N^o 18. 22. R. 2. Thomas Arundel*, Archbishop of *Canterbury*, was adjudged a Traytor by the King and Lords upon the Accusation of the Commons ; for that when he was *Chancellor*, he procured and executed a
 Com-

Commission, which they alledg'd to be traitterously made. *The Great Seal* it self cou'd not secure this Minister ; and yet, surely its *Authority is equal to a forc'd, tho' pretendedly equitable Construction of a Sign Manual.*

17. *Rich. 2.* The bare conspiring the Death of the Duke of *Lancaster*, was by King and Lords adjudged to be Treason, 1 *H. 4. R. C. N. 11. to 17.* *John Hall* being in Custody of the Marshal of *England*, was by him brought before the Lords in Parliament, and there charg'd by *Walter Clapton*, then *Lord Chief Justice*, by the King's Command, with being concern'd in the Murther of the Duke of *Gloucester*, who was smother'd to Death between Featherbeds at *Calais*, by the Command of *K. R. 2.* *John Hall* confessed the whole Transaction at large, which was put in writing by *James Billingsford*, then Clerk of the Crown, and was read to the Lords ; and upon hearing, the King and all the Temporal Lords in Parliament, resolv'd, That the said *John Hall* did by his own Confession deserve to suffer as severe a Death as they cou'd adjudge him to, because the Duke of *Gloucester* was so high a Person. And thereupon *toutz les Seigneurs temporalz, par assent du Roy*, did adjudge him to be hang'd, drawn, and quarter'd, &c. So that in this Case the Lords in Parliament pass'd a Judgment of High-Treason against a Com-

moner, for no other Crime but the Murther of a Great Peer.

This way of proceeding by *the House of Lords singly*, as it was very liable to Objection, it was soon laid aside ; but then the whole Parliament jointly acted the same Things, and supply'd their Jurisdiction by proceeding in Consequence of that declaratory Power reserved 25 *Ed. 3.* by way of Bill. As 3^o *R. 2.* for a farther Declaration of Treasons, it was adjudged by the Temporal Justices, and afterwards confirm'd by Parliament ; That whereas one *John Imperiall*, who was come as an Ambassador to the King (and was thereby under his Protection) to treat of an Alliance to be had and made between the King, and the *Duke and Comonalty of Genoa*, was Murther'd in *London* by *Kirby and Grove* : Such Act and Murther was Treason, and a Fault of the King's Royal Majesty impaired.

» There is nothing in this Case which cou'd
 » possibly bring it within the Statute of *Ed 3.*
 » without the Honour of the Nation was con-
 » cern'd that the publick Faith shou'd be kept.
 The Parliament, therefore did not think themselves obliged to *make a Law first* ; but they made the *first Criminal an Example*.

But what was the reason of this Case ? For it is that which in reality is the Law, and must govern us in our search after Treason ;

son. For if no Case can be concluded from Precedents to be treasonable, but only such as exactly Parallel and Quadrate in every Circumstance, Precedents are of no manner of use, since perhaps there *never were two Cases exactly alike.*

The reason was, certainly, because the „ Murther of an Ambassador being so high a „ Violation of the Law of Nations, gave to „ the Common-Wealth of Genoa, a *just Cause* „ of War against the King and his Kingdom. „

By this Rule, therefore, every Action „ which a Subject Commits, or is Accessory „ to, which may give a Foreign Nation a just „ Cause of War against his own Country, is „ treasonable. This seems to be almost self- „ evident; and if we apply it, what must we „ think of such Ministers, who in Defiance to „ the *Laws of Nations and natural Justice*, ad- „ vise a Sovereign to *violate publick Faith*, „ and Arbitrarily, without any Reason assigned, „ to declare themselves absolv'd from the most „ Solemn Engagements with antient Allies? „ *Can it be Treason to Correspond only with old* „ *Enemies, and yet justifiable to create new?* „

11° R. 2. Robert de Vere Duke of Ireland, Nevil, Arch bishop of York; Tresilian, and others, were attainted of High-Treason, for designing to subvert the Laws of the Kingdom: The Articles against them are very remarkable;

remarkable, but much too long to be transcribed.

Tresilian, Belknap, and several other *Lawyers* were adjudged Traytors, for delivering an Opinion (when they were demanded by the King) contrary to, and in Subversion of the Law of *England*. To give the Reader a Notion of what Doctrines were then in Parliament thought Treasonable, I shall briefly State two or three of the Questions proposed by the King, with these Gentlemen's Answers.

Q. 1. It was demanded, Whether after the Parliament was met, and the Business of the Kingdom, and Causes of summoning the Parliament declared ; if the King proposed Articles, upon which he shou'd Insist the Lords and Commons ought to proceed, and the Lords and Commons shou'd refuse to go upon the King's Articles, until they proceeded upon other Articles of their own.

Q. Whether the King was not so far the Master of his Parliament, as that they were obliged to go upon his Articles first ? To this Question these Judges answered, That in such Case the King ought to have the Government, and if any one presum'd to act to the contrary, he was to be punished as a Traytor. There was a long Dispute upon this very Point in the first Parliament that met, *Anno 1640. K. Charles 1.* insisted by variety

riety of Messages and Speeches made by Lord-Keeper *Finch*, that they should preferably to all other Business proceed to vote him a Supply, promising them, that they should sit long enough to dispatch any other Business they shou'd think fit to go upon: *The Commons refused* to comply with this desire of the King's, and insisted, that they ought to be at Liberty to proceed upon and remonstrate their Grievances, before they entred upon any other Business. After long disputing, they were at last dissolved in Anger for their Non-compliance in this Particular. And yet, my Lord *Clarendon* in his History, Vol. 1. Page 110. in Fol. owns,
 “ *It cou'd not be hop'd that more Sober, or*
 “ *Dispassionate Men shou'd ever meet together,*
 “ *and that it was not possible to imagine what*
 “ *Offence they had given to incite the King to*
 “ *that Resolution; Vid. Rush. Coll. p. 1114.*
 to 1155.

Q. 2. It was demanded, whether, when the King thought fit to remove any of his Judges or other Officers, and to punish them, those Officers might be *Impeached in Parliament* for their Offences, *without the King's Consent*. They answer'd, they could not, and that if any one acted to the Contrary, he was to be punished as a Traytor.

3. It was demanded, how he was to be punish'd, who mov'd in Parliament, that *the*
Statute

Statute might be sent for, by which *Edw. 2.* the King's great Grandfather, was adjudged in Parliament, by the Inspection of which Statute the new Statute Ordinance and Commission were conceiv'd? They unanimously answered, That as well he who so mov'd, as the other, who by pretext of that Motion, carried that Statute to the Parliament, were to be punished as Traytors.

N. B. The Articles of Impeachment against these Persons, are Printed in *Henry de Knighton de Even. Angl. intra Scriptores decem.* p. 2713. to 2727. The Questions proposed to the Judges, are in *pag.* 2694.

It is true that these Attainders were revers'd, *Anno 21 R. 2.* But then that whole Parliament almost was again revers'd, *p. 1. H. 4.* And in *that very Parliament which reduced Treasons to the Statute of Edw. 3.* these Attainders were confirm'd and made good, and are (I believe) in force unto this Day.

About this time the Method of proceeding in Parliament began to change; and instead of Indictments being first found against the Parties, and then return'd into Parliament, they have generally chosen to act in the way of Bill, as being the Method least liable to Doubts and Objections, and at the same time most useful and expeditious in those Circumstances, when the Necessities of the
State

State may require some exemplary Act of Justice. And I believe that for 300 Years past, no Person has been Attainted in Parliament for any Treason not specified in the Statute 25 Edw. 3. otherwise than by Bill ; which clearly evinces that way of Proceeding to be *as Parliamentary*, as any other can possibly be shewn to be. To enumerate all the Instances of Persons who have been in Parliament Attainted for Treason, by Bill, wou'd be endless. Indeed no Man pretends to controvert the Fact ; it is universally known that *this Act of Supreme Power* has been frequently exercised in almost every Reign. But one or two Acts of Attainder having pass'd, which some People apprehend to be unjust, and not to have had sufficient Foundation to support them, they from thence have *taken up a Notion*, that the very Power it self is naturally unjust.

It may be observed to be the *Humour of England*, that whenever any thing by abuse grows to be a Grievance to the People (be it in it self never so useful and necessary for the Support of Government) they can think of no other Remedy, but by taking the whole entirely away. They never so much as attempt *to correct and restore it to its Original Use*. But when the Want of it is felt, they supply it with some new Law, which is frequently

quently attended with Consequences much more grievous than the Mischiefs they reliev'd themselves from. *The Court of Star-Chamber*, whilst kept within due bounds, was certainly of the greatest Use to preserve the Peace and Security of the Kingdom; and perhaps was the only Court, which by its *ordinary and proper Jurisdiction*, could effectually *prevent and punish Riots, Perjuries and other Misdemeanors of the highest Nature*: But being made use of by the Court to support Proclamations and Orders of State, and to vindicate Illegal Commissions and Monopolies, that Extension of their Power became a Grievance insupportable; and the Nation was never easy till that Court was entirely suppress'd by Act of Parliament. *The House of Commons* were so eager in their Zeal to destroy what they called a *Court of Inquisition*, that tho' the Bill was of so great Consequence, yet they sent it up to the Lords, with only once reading it, and without its being ever committed, which was a thing perhaps never before heard of in Parliament, *Cla. v. l. 223.* At the Restauration of *King Charles II.* this National Disposition appeared in variety of Instances; People were become so weary of the Miseries they had groan'd under, during the time of the *Usurpation*, that they universally conceiv'd the
utmost

utmost Detestation and Abhorrence of all those Proceedings which they apprehended had been in any manner conducive to bring them upon them. But then it was with so little distinction and reserve, that it became Fashionable (and almost necessary) to shew their Zeal to the King, by thinking and acting in every particular, contrary to those Men who had in some measure brought on the Civil Wars. And it was then (as it still is) a sufficient Reason, with a great number of Men, to condemn any Principle or Proceeding, if they did but believe *it had been professed or practised* by the Parliament in 1641. Every one knows that *the Earl of Strafford* was Attainted by Act of Parliament in *Chā. 1st's* time, and that his Attainder was, after the Restoration, revers'd by Parliament. That Earl's Case was commonly thought to be very hard : For considering the particular Defence which he made to every Article; and that *no one Fact* was prov'd clearly against him, which was in it self Treason, People generally concluded, that Personal Malice against the Earl, or some other sinister Design, was more consulted in that Prosecution, than the Desire or Love of Justice. This *Act of Attainder* has now for Fifty Years been constantly represented to the People as the highest Act of Injustice, and with great
Manage-

Management and Industry (few Ministers loving that Doctrine which leads a Parliament to examine into and punish their Misdemeanors in so severe and extraordinary a manner) they have instilled and propagated in the Minds of Men a disesteem (and almost hatred) of *that Power* which is so often necessary to prevent the Ruin of their Country, or to *punish Criminals who have attempted it*, and which their Fathers prided and valued themselves in the Possession of. To remove this Prejudice, I shall therefore briefly endeavour to shew the natural Justice of Bills of Attainder, and then conclude this Paper.

A Bill of Attainder may in some Sense be styl'd a *Parliamentary Judgment*. The Supreme Legislative Power of the Nation, by it exempts the particular Case of a notorious Criminal from those Courts, and from those Rules which are appointed for the Tryal of the Generality of Cases, and inflict a Punishment upon him adequate to the Crime they are convinc'd he is guilty of. However, this manner of proceeding being but a *Mode of Punishment*, to shew the natural Justice of it, it will be necessary to consider, how the Right or Power of Punishment is derived to the *publick Part* of any Society.

All

All Authors allow, that in the State of Nature, every Individual had a Right to defend, either his Person or Property, by all necessary Means whatsoever, when it cannot otherwise be affected, even by the Death of the Aggressor. From this Principle *Solely*, have some endeavour'd to derive the Right of punishing to the Magistrate. But to me, it does not seem to be a sufficient Foundation, for the whole Extent of *Political Power*. Let it be, therefore, farther considered, that the State of Nature is not without a Law. *Reason is that Law*. And that teaches, That all Men being naturally equal; no Man ought to prejudice another, either in his *Person or Property*; but on the contrary, they ought to assist one another by all means justifiable. For as the Law of Nature willeth the Peace and Preservation of all Mankind, every Man is equally concern'd in the Observation of it: And therefore, that all Men might be restrain'd from acting contrary to it; the Execution of the Law of Nature is in that State vested *in every Man*; and in Consequence of that Law, every Man may Punish (that is, inflict a Pain upon) every Transgressor of it, to such a Degree, as may hinder its Violation for the future. For the Law of Nature, like all other Laws, wou'd be in vain, was there no Body in that State who had a Right to make the *Observation* of it

more obviously the Interest of every Individual, *than the Transgression*. And if in the State of Nature, *any one Man* can punish an Offender for an Offence or Injury done to another, *every one may*.

From these two Principles united, the Power of the Sword is *fully* deriv'd to the Magistrate. Society is form'd by the Consent of Particulars, and must necessarily be suppos'd to have been intended for the mutual Good of every individual Member of which it is composed. The *Right of the whole*, is the Sum of the Rights of *every Individual*; and consequently the Whole can be possess'd of no Right; but what, in some manner, resided in each particular, who must be supposed, to have granted over to the Society as such, every Right which it is inconsistent for him to retain in a Social State. And therefore, as every Individual in the State of Nature has an absolute Right to defend himself from all Attempts whatsoever; *and likewise, as every Individual has an absolute Right*, or is rather under a sort of Obligation to exact the Observation of the Law of Nature from every Man, and to assist the injur'd Person against the Oppressor: *By every Individual's* departing for himself from each of these Rights, both of them are entirely transferr'd to *the Society as such*, and from *thence to the Magistrate*, or Persons vested

vested with the *Legislative and Executive* Power. And therefore, whatsoever is absolutely necessary to the Preservation of the *Society as such*, the *Legislative part* of it can justify the doing. And whatever Punishment, Fine, &c. is but equal to the Injury or Damage done to the Society as such, or necessary to prevent its being attempted for the Future, they may justly inflict. For surely it is the height of Absurdity to imagine a Government under an Obligation to afford Protection and Reparation to *any one Individual* ; and yet, at the same time under a moral Incapacity of affording it to *all the Individuals* considered together as *one Body*.

But these Observations may, perhaps appear too general ; it will be necessary therefore to consider the Force of the Objections made to this Doctrine. The Strength of them, as has been before observed, amounts to this: That the explicate Laws of every Society being the Standard, if not of Right and Wrong, at least of what is punishable or unpunishable, therefore *Bills of Attainder* are unjust, because it is the punishing a Person for Actions which he had reason to think himself *secure* in doing.

This Proposition destroys the very Notion of Right and Wrong, and makes the whole of Morality to be *purely Accidental and Political*.

litical. But surely there is something else requisite to Justice, besides a *bare Establishment*: Let us therefore examine it to the bottom, and see how far a Government is obliged to give every Individual Notice for what he is, or is not to be punished.

Right, abstractedly considered, is previous too, and perfectly distinct from all Human Establishment: It arises from that *necessary Relation* which the Actions of one Rational Agent bear to another. When they are consonant to those mutual Obligations all Mankind are naturally under, they are denominated Just; when contrary, Unjust. This is Natural Reason; and Society can only give an additional Sanction to these *eternal Laws of Action*, by the inflicting effectual Rewards and Punishments: It is absolutely impossible to make them either more or less Just. But then *subsequent to Society*, a new Species of Right and Wrong has been introduced; so that those Actions which are *Mala in se*, or naturally Evil, must be carefully distinguish'd from those which are *Mala quia prohibita*, or Evil by reason of some Social or other Establishment. This Distinction seems to solve the whole Difficulty, since it is universally allowed to be an Injustice in any Government, to punish the latter sort, without a due previous Notice, (indeed to speak exactly, no Action of that Nature is unjust,

unjust, till the Law prohibiting them is sufficiently promulg'd.) And of the former sort there are Crimes so shocking, that all Mankind must agree, they ought to be capitally punished, altho' there were not any *written Laws in the Universe*. It is not possible that any Legislature whatever shou'd be able to provide for all future Contingencies; such monstrous Crimes are frequently committed, that they are not provided against, because the Government did not imagine Mankind to be capable of them? Does it therefore follow, the Criminal is not to be punish'd who *first ventur'd* to commit them? For a considerable time among the *Romans*, there was no Law against Parricide; was it therefore unjust to distinguish *the first Man* who durst venture on so monstrous a Crime, by a Punishment extraordinary? Before the 22. *H. 8. c. 9.* there was no particular Law in *England* against poysoning, was it therefore unjust by Bill of Attainder to make an Example of the *first Man* who introduc'd so detestable a Villany? Setting Fire to one of the King's Ships is not Treason within the Statute 25 *Edw. 3.* yet cou'd any one think it unjust, shou'd the Parliament *by Bill Attaint* the Person of *High-Treason*, who shou'd set Fire to the whole Royal Navy? For after all, a Man's being Attainted by Bill of High-Treason, amounts to no more than a Decla-

ration of the Supreme Power, That the Crime the Person is guilty of deserves the Punishment assigned to those Crimes which are commonly known by the Name of High-Treason. Neither is it unusual for that Term, to signify no more than a designation of Punishment. As, *e. g.* it is High-Treason in *Ireland*, wilfully to commit Murder, to burn a Stack of Corn, Hay, &c.

Crimes of this magnitude no Man can pretend to be ignorant of; they never were committed, but the Criminal was Conscious of the Injustice of what he did. And therefore no *previous Notice* is necessary to justify his Punishment; for the only Reason which makes Notice necessary to the punishing Crimes of the other Nature, is, because no Man *can know* whether such a particular Action be Criminal, until he be informed of its being prohibited.

If this Doctrine therefore be true in respect to the Cases above-mentioned, much more is it so when apply'd to those Crimes which affect Mankind in a higher manner.

The Punishment surely ought to bear some proportion to the Injury: The greatest Enemies to Bills of Attainder wou'd acquiesce under them, were they only applied to the Punishment of *Murderers, Poysoners, Parricides, &c.* They wou'd not in such Cases ob-
ject

ject to the Proceeding, as being *ex post facto*. The natural Villany of such Crimes is so evident, no Man cou'd be found absurd enough to affirm, the Criminal ought not to be capitally punish'd, because no explicate Law of the Society was *nominally* pronounc'd against so great a Crime *previous to its Commission*. How then can they oppose the Exercise of this Power against Crimes of so superior a Nature? Are they not equally Evident? Are they not equally contrary to the Law of Nature? They differ in nothing but the *Extent of their Mischief*. All Actions, „ which *no Law* whatsoever can make Just, „ must necessarily be Evil in themselves, and „ therefore may justly be punish'd by the Su- „ preme Power of every Society, whenever „ they are committed, although no particular „ Law should be provided against them. It is „ the Law which is the *Bond* of Society, and creates that Political Tye which is between the Subject and the Sovereign. It is by that the Government subsists; that each Individual enjoys *Security, Property, and even Liberty it self*: Take that away, the Government is at an End, Society is dissolv'd, and Mankind, become mutual Enemies to one another, are liable to all the Mischiefs incident to such a State. It is therefore *Treason from the very Nature of Things*, for any Man to attempt the *Subversion of that Law* he is Born

Subject to. No Law *can justify* such an Action? The Punishment of it is *absolutely necessary to the Preservation of Government*; and if it cannot be done in the ordinary Methods of Proceedings, the Law of Self-Defence legitimates *any other*, tho' never so extraordinary. For there is no way under Heaven of preventing Crimes which Human Prudence cannot foresee, but by making an Example of every Man who shall commit them. My Lord *Clarendon* himself was so far convinc'd that this was High-Treason, that he carried up an Impeachment from the Commons to the Lords, against Three Barons of the Exchequer, for the Opinions they had given in the Case of Ship-Money, which the *House of Commons had voted to be in Subversion of the Law of England*. It never was thought that the delivering a false Opinion in Point of Law (which may proceed from Ignorance as well as Corruption) was High-Treason within any Statute; and yet upon the delivery of the Articles against them, he made *as warm a Speech* to the House of Lords, *as the greatest Champion for accumulative Treason*, *Russ. Coll. Vol. 5. p. 333.*

This therefore being the State of the Case, I think it needless to make any particular Application of this Doctrine to the late Transactions. It is not the Business of particular Persons in their private Capacity, to pronounce

pronounce this or that Person guilty of such high Crimes. But I think every Man ought to be convinc'd, that the Supreme Powers of every Society, have not only a Right, but are under an actual Obligation to take Care, *Ne quid detrimenti Respublica capiat*. If the Principles before laid down, are once admitted to be true, every Reader, with very little Reflection, will be able to make proper Conclusions. For as every Society, as has been said, is form'd by the Consent of Particulars, so it necessarily follows from thence, that every Individual engages himself to do all that he is able to support it; and to submit his Person, and all that he has, in Proportion with the other Members, to the Disposition of the Supreme Legislative Power. It is visible that no Society can be maintained without such Engagement. And therefore *it is Treason from the very Nature of Things*, for any Man to do any Thing *animo lædendi*, which may turn to the Prejudice of the Society of which he is a Member. And it being impossible to foresee all the various Methods by which a Society may be prejudic'd, it is likewise impossible, by any positive Law, to prohibit them; and therefore it is just even *ex post facto*, to punish such Crimes whenever they shall be committed; since every Man must necessarily be supposed to know that they

they are Criminal. Neither can it be objected to this Method of Proceeding *by Bill of Attainder*, that the Party concern'd is not allowed every Privilege which is essential to a fair Trial; for all that any Criminal is entitled to by the Laws of natural Justice, is a Liberty to make his full Defence; and if every Thing *necessary to that End*, be allowed him, he can have no Reason to complain. And it is notorious, that whenever any private Bill is depending in Parliament, any Man, upon Suggestion that he is a Party concern'd in Interest, in the Success of the Bill, may be heard by Counsel against it; *much more therefore, will it be allowed* any Man, against a Bill of so high a Nature as that of *Attainder*. And in Fact it was allow'd in the Case of Sir *John Fenwick*. This I look upon to be a sufficient Answer to this Objection. As to the Methods of Proceeding in Bills of Attainder, and what is, or is not, to be admitted as Evidence upon such Occasions, &c. 'tis a Subject much too long to be meddled with in this Paper, and wou'd very well deserve a distinct Treatise. Only this in General may be observ'd, That the Method of trying Criminals, and the Rules for examining whether any Person be guilty, or not, are *different* in almost all Nations. But it is universally agreed, and so accounted in all

Laws,

Laws, that whatsoever makes the *Truth evident*, is *sufficient Evidence*. So that when it is agreed, that the Crime any Person is charged with, deserves the highest Punishment, every Man concern'd (provided that by the Evidence produc'd, &c. he is in Conscience convinc'd, that the Person accused is guilty) acts justly, and as he is obliged to do, when he gives his Consent to a Bill of Attainder. For that certainly must be *sufficient Evidence* to me, which induces me to *believe the Fact*.

To conclude therefore: The whole of what has been said, may in short be summ'd up thus: That *High-Treason* being at the Common Law, (*any horrible Offence done, animo lædendi, against the Security of either King or Kingdom,*) and the Judges in the common Courts of Law, having the entire Cognizance of it; they, in order to *secure considerable Forfeitures* to the Crown, and improve their *own Interest* at Court, manag'd that almost Discretionary Power, which they necessarily had in the Adjudication of constructive (or such) Treasons, which depend upon Inferences from Facts, that it became an intolerable Grievance to the Subject: To remedy which, the Statute 25 *Ed. 3.* was made, and thereby the Jurisdiction of the ordinary Courts at Law is limited and confin'd to the particular Cases

Cases of Treason, specified in that or some other subsequent Statute.

It appears manifestly by the Petition of the Commons, upon which the Statute was made, that this Abuse in the Judges, was the Mischief against which it was levell'd. And it is evident from the very Terms of the Statute, that the Intention of the Legislators was not *to annihilate* all the Treasons at Common Law, except those mentioned in it, but only to abridge this Jurisdiction of the Judges : Since by a particular Clause, the Punishment of all other Cases of Treason is *expressly reserv'd* to the Parliament. And the Reason assign'd for this Clause of Reservation is, because it *is impossible* to enumerate all Cases of Treason. And in Fact, Treason may be committed so many various Ways, and depends upon *so many Contingencies*, that it is absurd to imagine any present Set of Legislators can by any positive Law, *nominally* provide against them.

This therefore being the Nature of the Thing, the Clause of Reservation, is only *in Affirmance* of that Power, which no Parliament can ever be supposed to be without. And the Dispute whether the Clause be repealed or not, is quite out of the Question, and I insisted upon its not being in Fact repeal'd, (as will appear to every one who considers

considers the Terms of the Statutes 1. H. 4. c. 10. and 1^o Ma. Reg. cap. 1.) only to obviate and prevent any plausible Objection which might be made.

This Act of Parliament therefore extends no farther than to regulate and abridge the Jurisdiction of the Inferior Courts of Justice; And Treason in it self is just as it was before this Act of Parliament was made; only with this Difference, that the Common Judges are bound down to such Cases as are specify'd in this or some other Statute; and the Punishment of constructive or other Treasons is reserved entirely to the Parliament, as being dangerous to be trusted with any *Subordinate Power*. And the Parliament has, in Fact, always exercised this extraordinary Power in every Age, nay, in every Reign almost, several Persons have been condemn'd and executed as Traytors, for Facts not specify'd in this or any other Statute.

Indeed; formerly Bills have been found for any of these extraordinary Facts by a Common Jury, and then return'd into Parliament for a Determination: but this Method of proceeding has been long altered, and for 350 Years past, no Man has been executed for any Treason of this Nature, otherwise than by *Bill of Attainder*. It is no manner of Objection to say, that this is making

making a new Law on purpose to hang a particular Person ; for so long as the Criminal has every Thing allowed him that is essential to the making his Defence, he can have no reason to complain. And it is certain, that any Man concern'd may be heard by Council, or otherwise, at the Bar of either House against such a Bill : The Method of proceeding against any Criminal is in its own Nature variable ; and therefore it is ridiculous to except to this ; since the Parliament, as such, consisting of different Parts, has *no Method* of expressing any Determination, &c. but by *Bill* passing both Houses, and the Royal Assent. It can be but Repetition to repeat the Reasons why the Exercise of this Power is naturally just. That every Man who commits a *Crime in its own Nature Evil*, shou'd receive a Punishment adequate to it, is so *manifestly reasonable* ; and that a Supreme Legislative Power shou'd be bound down by Forms from inflicting Punishments upon such Crimes as affect the very Being of Government it self, and make their Punishment absolutely necessary to its Preservation, is *manifestly so absurd*, that it would be losing Time to say any more concerning it.

„ I think I need add no more. If the Judges
 „ before the Statute 25 *Ed.* 3. had a Power to
 „ punish any Man as a Traytor, for any Fact
 which

which they apprehended was done with a design to *prejudice the Publick as such* : The Parliament by taking it away, shew manifestly, That that Power was derived from themselves, and must therefore *necessarily* be inherent in them.

What I have now written, as it was sincerely intended for the Service of the Publick, so it is entirely submitted to their Censure. As to any Mistakes which may be observ'd in this Paper, I shall never concern my self to justify, but shall freely acknowledge them. Since I shall equally attain my End : If I provoke some abler Hand to set the World right in their Notions concerning Treason. Or if I persuade one honest Man, who has been deceived, to believe this almost self evident Proposition, *That, when it is the Act of the Supreme Power, whoever deserves to Die, Dies justly.*

F I N I S.

